TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 896.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HARRY A. BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MARCH 17, 1916.

(24,618)

(24,618)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 399.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

HARRY A. BROWN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court, at Oklahoma City, this 5th day of March, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

1 Filed Feb. 19, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

No. —.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Citation on Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Harry A. Brown, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein the St. Louis and San Francisco Railroad Company is plaintiff in error, and you, Harry A. Brown, are defendant in error, to show cause, if any
2 there by, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in this behalf.

Witness, The Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this 18 day of Feb'y, A. D. 1915.

M. J. KANE,
Chief Justice of Supreme Court of State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of State of Oklahoma.

By —— ——, *Deputy.*

OKLAHOMA CITY, OKLA., Feb. 19, 1915.

We, the undersigned attorneys of record for defendant in error in the above entitled cause, hereby acknowledge service of the above citation, and enter our appearance in the Supreme Court of the United States.

STUART, CRUCE & CRUCE,
Attorneys for Defendant in Error.

3 Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Oklahoma:

Your petitioner, the St. Louis and San Francisco Railroad Company, respectfully shows that on the 22nd day of May, 1914, the Supreme Court of the State of Oklahoma entered a judgment herein in favor of defendant in error and against plaintiff in error, in which said judgment and proceedings had prior thereto in this cause
4 certain errors were committed, to the prejudice of this petitioner; all of which more in detail appear in the assignment of errors filed with this petition.

That after the rendition of said judgment, and on the 6th day of October, 1914, your petitioner filed a petition for rehearing; that thereafter, on the 22nd day of December, 1914, an order was made by this Court, denying said petition for rehearing. Thereupon, an opinion was filed in this cause by this Court, affirming the judgment of the District Court of Carter County, State of Oklahoma, which opinion is a part of the record in this cause.

And your petitioner, the defendant below, respectfully shows that there was a judgment in said cause in the District Court of Carter County, State of Oklahoma, in favor of the defendant in error and against your petitioner, in the sum of Sixteen thousand, nine hundred ($16,900.) Dollars, and the costs of suit, with interest thereon from the date of said judgment at the rate of six (6%) per cent. per annum; which said judgment, upon appeal to the Supreme Court of the State of Oklahoma, was affirmed by said court.

And your petitioner further respectfully shows that the said Supreme Court of the State of Oklahoma is the highest court of the state of Oklahoma in which a decision in said cause could be had; and your petitioner claims the right to remove said cause to the Supreme Court of the United States by writ of error, under the Statutes of the United States authorizing writs of error to State Courts, inasmuch as in said judgment of said Supreme Court
5 of the State of Oklahoma, and the proceedings in said cause, certain errors were committed, to the prejudice of your petitioner; all of which will more in detail appear from the assignments of error which are filed with this petition.

And because by said judgment of the Supreme Court of the State of Oklahoma there was denied to your petitioner a right, title, privilege or immunity claimed by your petitioner in the proceedings in said cause, under the Constitution of the United States, and under the several Statutes of the United States, and an authority exercised under the United States;

And because your petitioner claimed in said cause that, under the Employers' Liability Act, the same being: "An Act Relating to the liability of common carriers by railroad to their employés in certain cases," approved April 22, 1908, and the Amendment thereto, approved April 5, 1910, all twelve of the jurors empaneled, selected, and sitting in said cause should have concurred in the verdict returned therein, whereas, only nine of said jurors so concurred in the verdict returned; and that the only right or remedy of said defendant in error to enforce a liability against your petitioner for an injury alleged to have been sustained while in the regular employ of plaintiff in error, which, it is alleged, was engaged in interstate commerce, was that conferred by the Act of Congress above referred to; and that said right or remedy so provided was and is exclusive of and superseded all rights or remedies existing by virtue of any previously existing State Statute, Constitution, or regulation, which said claim of a right, title, or immunity under said Act of
6 Congress and the Amendment thereto, was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma.

And because your petitioner claimed in said cause that it was entitled to interpose in said cause, as a defense to defendant in error's alleged cause of action the defense of assumption of risk, and claimed that defendant in error's alleged cause of action did not grow out of the violation of any statutory duty owing by plaintiff in error to the defendant in error. But this Court, in the opinion affirming the judgment of the lower court, say:

"* * * Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress, the rule seems to be that the assumption of risk is not a defense; and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the court would have been warranted in submitting this issue to the jury. The fact that the court may have committed error in charging the jury

on this point, under such circumstances, would not warrant a reversal."

Which holding by the Supreme Court of the State of Oklahoma denied to your petitioner said claim of a right, title or immunity under said Act of Congress and the Amendment thereto, above referred to.

And because your petitioner claimed that, while defendant in error's petition stated a cause of action under both the Employers' Liability Act, above referred to, and under the Safety Appliance Act of Congress, approved March 2, 1893, when the trial court, at defendant in error's request, instructed the jury as follows:

"You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in
7 whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

his cause of action, under the last named Act of Congress, fell; and that all of his evidence in support thereof necessarily fell with the abandonment of that charge of negligence; that it conclusively appeared from the remaining evidence that his injury was due to an assumed risk, and the trial court should have so held, as a matter of law; which claim of a right, title or immunity under said Act of Congress, and the amendments thereto, was denied your petitioner by said judgment of the Supreme Court of the State of Oklahoma.

And because your petitioner in said cause claimed that when defendant in error abandoned and withdrew his charge of negligence growing out of an alleged violation of the Safety Appliance Act, above referred to, it was then entitled to interpose the defense of assumed risk, under the Employers' Liability Act, above referred to, and to have the jury properly instructed upon this defense; which claim of a right, title or immunity under said Act of Congress, and the Amendments thereto, was denied your petitioner by said judgment of the Supreme Court of the state of Oklahoma.

And because your petitioner in said cause claimed that, if the jury found that the defendant in error was guilty of negligence contributing to his injury, the duty of the jury to diminish the damages in proportion to the amount of negligence attributable to said defendant in error was mandatory and imperative; which claim of a right, title or immunity under said Act of Congress, and the Amendment thereto, was denied your petitioner by the judgment of
8 the Supreme Court of the State of Oklahoma.

And because your petitioner claimed in said cause that it was entitled to have the jury instructed upon the meaning of the word "proportion" as used in the Employers' Liability Act, above referred to; which said claim of a right, title or immunity under said Act of Congress, and the Amendment thereto, was denied your petitioner by the judgment of the Supreme Court of Oklahoma.

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"13.

"If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. (Excepted to by defendant; S. H. Russell, Judge)."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"18.

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant. Excepted to by defendant, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in giving to the jury the following instruction:

"19.

"Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"6.

"You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the

trial court did not commit error in refusing to give to the jury the following instruction:

"12.

10 "If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3, of the Act of Congress, of April 22, 1908, U. S. Stat. L. p. 66, which is as follows:

'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'

The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion,' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute, we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such a part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But, if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or

11 just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict."

And because your petitioner claimed in said cause that the Su-

preme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"17.

"You are instructed that if you find from the evidence that plaintiff, at the time of his alleged injury, was not employed in interstate commerce by the defendant, as defined in instruction No. 8, then, and in that event the contributory negligence of the plaintiff would be a complete defense to this action, regardless of the negligence of the defendant; that is, even though the plaintiff was injured as a result of the negligence of the defendant, yet if the plaintiff failed to exercise that degree of care which an ordinarily prudent man would exercise, as the result of which he was injured, this would constitute contributory negligence and he could not recover.

"The violation by the plaintiff of any of defendant's rules in force at the time, which contributed to his injury, would constitute contributory negligence.

"It was the duty of the plaintiff to operate the coupler on the cars in question by the lever provided for that purpose at the side of the car, without going upon the track or between the ends of the cars. It was his duty to avoid the dangerous way of adjusting or preparing these couplers for impact, and to use a safe way. If he chose a dangerous way and was injured as a result thereof, he would be guilty of contributory negligence and could not recover. Refused, Defendant excepts, S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"18.

"If you find from the evidence that the plaintiff was not employed in interstate commerce at the time of the injury, as hereinbefore defined, and you find that he was injured by reason of the
12 car running over him after he had given the engineer of the train a signal to back, or if you find that the plaintiff went on the track in front of a moving car, in violation of a rule of the defendant; or if you find that the plaintiff went on the track to adjust the coupler of a car, whether such car was moving or not, when he could have operated it by remaining outside of the track; or, if you find that plaintiff went into a place of danger where he was not required to be, or if you find that he was injured as a direct result of violating any of the rules of the defendant, in force at that time, then, and in that event he would be guilty of contributory negligence and could not recover, even though the defendant was negligent. Refused, Defendant excepts. S. H. Russell, Judge.

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"19.

"If you find that the plaintiff was not employed in interstate com-

merce at the time of the alleged injury, as hereinbefore defined, then and in that event the defense of contributory negligence and assumption of the risk would both be available to the defendant, and the plaintiff could not recover, regardless of the negligence of the defendant, if you find that he was guilty of contributory negligence as defined in these instructions, or if you find that he was injured as the result of a risk assumed by him, incident to his occupation, as defined in these instructions. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"22.

"You are instructed that if you find from the evidence that the proximate cause of the injury of the plaintiff was that he stumbled or slipped and fell while walking or running on the track
13 of the defendant in front of the car he was engaged in switching, and you find that the risk of stumbling or slipping and falling while so engaged is incident and usual to the occupation of brakeman, then and in that event the plaintiff would be deemed to have assumed such risk by engaging in such employment and in continuing in the service of the defendant, and would not be entitled to recover. Refused, Defendant Excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"24.

"If you find from the evidence in this case that the plaintiff was not employed in interstate commerce at the time of the accident, as hereinbefore defined, even though you further find that he was injured by reason of the engineer of the defendant backing a car over the plaintiff, this would not entitle the plaintiff to recover, unless you further find that he was rightfully on the track in front of the car. If there was no necessity for the plaintiff to go on the track in front of the car, or if he was prohibited from so doing by the rules of the defendant company, then he would have no right to go upon the track and, if he was injured by reason of so doing, he would be guilty of contributory negligence, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"28.

"You are instructed that if you find that the plaintiff is entitled to recover under the instructions heretofore given you, then it becomes your duty to ascertain the amount of damages to which
14 he would be entitled. The damage which you can assess should be compensatory only, and should be reasonable, and not

excessive. In determining these, you may take into consideration the pain and suffering of the plaintiff, both physical and mental, loss of time from the pursuit of his occupation, and, if you find that his injuries are permanent, decrease of his earning capacity; and from these considerations you should fix such sum as in your judgment would be a fair and just compensation for the injuries received, not exceeding the amount sued for in the petition. Refused, Defendant excepts. S. H. Russell, Judge."

And because your petitioner claimed in said cause that the Supreme Court of the State of Oklahoma erred in holding that the damages awarded the defendant in error were not excessive.

Wherefore, Your petitioner claims and says that by a final judgment in a suit in the highest court of the State of Oklahoma, in which a decision in said cause could be had, there was a right, title, privilege or immunity which was specially set up or claimed under the Constitution of and under the Statutes of the United States by your petitioner; and the decision of said court was against such right, title, privilege or immunity which was so specifically set up and claimed by your petitioner under such Constitution and such Statute. And wherefore, and in accordance with the Statutes in such cases made and provided, your petitioner prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors, an assignment whereof is filed with this petition, and that a transcript of the record, proceedings, files, and papers in this cause, duly authenticated,
15 may be sent to the Supreme Court of the United States.

And your petitioner prays for the allowance of a citation in due form of law; and your petitioner will ever pray.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Petitioner and Plaintiff in Error,

By W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Its Attorneys.

16 Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma.

No. —.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Assignments of Error.

Comes now the St. Louis and San Francisco Railroad Company, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of the judgment of the trial court, and in the opinion and judgment of the Supreme Court of the State of Oklahoma in said cause, manifest errors were committed to its prejudice, which are apparent from the record therein; that the errors committed by the trial court and affirmed by the Supreme Court of the State, and committed by the Supreme Court of the State in its opinion and judgment in said cause, are more fully and particularly set forth as follows:

17 I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, state of Oklahoma.

II.

The Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Carter County, state of Oklahoma.

III.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause; and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, was not exclusive of the Constitution, laws, and regulations of the state of Oklahoma, as to actions prosecuted under said Act.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error grew out of a violation of a statutory duty, arising under an Act of Congress; and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not
18 abandon and withdraw all his testimony respecting such alleged violation of said Statute.

VI.

The Supreme Court of Oklahoma erred in holding that after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

VII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"13.

"If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. Excepted to by defendant, S. H. Russell, Judge."

VIII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"18.

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are
19 instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant. Excepted to by defendant, S. H. Russell, Judge."

IX.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"19.

"Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree, and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

X.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"6.

"You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce."

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"12.

"If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:

'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributed to such employe.'

"The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in statute we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to

describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict. Refused, Defendant excepts. S. H. Russell, Judge."

21 XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

"17.

"You are instructed that if you find from the evidence that plaintiff, at the time of his alleged injury, was not employed in interstate commerce by the defendant, as defined in instruction No. 8, then and in that event the contributory negligence of the plaintiff would be a complete defense to this action, regardless of the negligence of the defendant; that is, even though the plaintiff was injured as a result of the negligence of the defendant, yet if the plaintiff failed to exercise that degree of care which an ordinarily prudent man would exercise, as the result of which he was injured, this would constitute contributory negligence and he could not recover.

"The violation by the plaintiff of any of defendant's rules in force at the time, which contributed to his injury, would constitute contributory negligence.

"It was the duty of the plaintiff to operate the coupler on the cars in question by the lever provided for that purpose at the side of the car, without going upon the track or between the ends of the cars. It was his duty to avoid the dangerous way of adjusting or preparing these couplers for impact, and to use a safe way. If he chose a dangerous way and was injured as a result thereof, he would be guilty

of contributory negligence and could not recover. Refused, Defendant excepts. S. H. Russell, Judge."

XII.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"18.

"If you find from the evidence that the plaintiff was not employed in interstate commerce at the time of the injury, as hereinbefore defined, and you find that he was injured by reason of the car running over him after he had given the engineer of the train a signal to back, or if you find that the plaintiff went on the track in front of a moving car, in violation of a rule of the defendant;
22 or if you find that the plaintiff went on the track to adjust the coupler of a car, whether such car was moving or not, when he could have operated it by remaining outside of the track; or, if you find that plaintiff went into a place of danger where he was not required to be, or if you find that he was injured as a direct result of violating any of the rules of the defendant, in force at that time, then and in that event he would be guilty of contributory negligence and could not recover, even though the defendant was negligent."

XIII.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"19.

"If you find that the plaintiff was not employed in interstate commerce at the time of the alleged injury, as hereinbefore defined, then and in that event the defenses of contributory negligence and assumption of the risk would both be available to the defendant, and the plaintiff could not recover, regardless of the negligence of the defendant, if you find that he was guilty of contributory negligence as defined in these instructions, or if you find that he was injured as the result of a risk assumed by him, incident to his occupation, as defined in these instructions. Refused, Defendant excepts. S. H. Russell, Judge."

XIV.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"22.

"You are instructed that if you find from the evidence that the proximate cause of the injury of the plaintiff was that he stumbled or slipped and fell while walking or running on the track of the defendant in front of the car he was engaged in switching, and you

find that the risk of stumbling or slipping and falling while so engaged is incident and usual to the occupation of brakeman, then and in that event the plaintiff would be deemed to have assumed such risk by engaging in such employment and in continuing in the service of the defendant, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

23 XV.

"24.

"If you find from the evidence in this case that the plaintiff was not employed in interstate commerce at the time of the accident, as hereinbefore defined, even though you further find that he was injured by reason of the engineer of the defendant backing a car over the plaintiff, this would not entitle the plaintiff to recover, unless you further find that he was rightfully on the track in front of this car. If there was no necessity for the plaintiff to go on the track in front of the car, or if he was prohibited from so doing by the rules of the defendant company, then he would have no right to go upon the track and, if he was injured by reason of so doing, he would be guilty of contributory negligence, and would not be entitled to recover. Refused, Defendant excepts. S. H. Russell, Judge."

XVI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury the following instruction:

"28.

"You are instructed that if you find that the plaintiff is entitled to recover under the instructions heretofore given you, then it becomes your duty to ascertain the amount of damages to which he would be entitled. The damage which you can assess should be compensatory only, and should be reasonable, and not excessive. In determining these, you may take into consideration the pain and suffering of the plaintiff, both physical and mental, loss of time from the pursuit of his occupation, and if you find that his injuries are permanent, decrease of his earning capacity; and from these considerations you should fix such sum as in your judgment would be a fair and just compensation for the injuries received, not exceeding the amount sued for in the petition. Refused, Defendant excepts, S. H. Russell, Judge."

24 XVII.

The Supreme Court of the State of Oklahoma erred in holding that the damages awarded the defendant in error were not excessive.

For which errors the said St. Louis and San Francisco Railroad Company, plaintiff in error, prays that the said judgment of the Supreme Court of the State of Oklahoma, and of the District Court of Carter County, State of Oklahoma, be reversed, and judgment

rendered in favor of the plaintiff in error; and for such other and further relief as to the Court may seem just and proper, and for its costs.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

25 In the Supreme Court of the United States and in the Supreme Court of Oklahoma.

Filed Feb. 5, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Order Allowing Writ of Error.

Let the writ of error issue as prayed for upon the execution of a bond by the St. Louis and San Francisco Railroad Company, payable to Harry A. Brown, in the sum of $40,000.00, with good and sufficient sureties, approved and conditioned as provided by law, such bond when so approved to operate as a supersedeas bond.

Dated at Oklahoma City, Oklahoma, this 5 day of February, 1915.

[SEAL.]

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
WILLIAM M. FRANKLIN,
Clerk Supreme Court Okla.

In the Supreme Court of the United States and in the Supreme Court of the State of Oklahoma.

26 Filed Feb. 19, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, or some of you, the highest court of law or equity in said State in which a decision could be had in said suit between the St. Louis and
27 San Francisco Railroad Company, plaintiff in error, and Harry A. Brown, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute or of an authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States — was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said
28-30 Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 19th day of February, A. D. 1915.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk United States District Court for the Western District of Oklahoma.

Approved and allowed by the Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

* * * * * * *

Attest:

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of State of Oklahoma.

31 (Filed Jun- 11, 1913. W. H. L. Campbell, Clerk.)

In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Petition in Error.

The St. Louis & San Francisco Railroad Company, plaintiff in error, complains of the said defendant in error, for that the said Harry A. Brown, at the — term of the District Court of Carter County, state of Oklahoma, recovered a judgment by the consideration of said court against the St. Louis & San Francisco Railroad Company, in a certain action then pending in said court wherein the said Harry A. Brown was plaintiff and the said St. Louis & San Francisco Railroad Company was defendant; the original case-made duly certified and attested is hereunto attached, marked exhibit "A," and made a part of this petition in error.

32 And the said St. Louis & San Francisco Railroad Company avers that there is error in said record and proceedings in this, towit:

I.

Irregularity in the proceedings of the court and abuse of discretion by which said plaintiff in error was prevented from having a fair trial.

II.

Misconduct of the jury, whereby plaintiff in error was prevented from having a fair trial.

III.

The verdict of the jury is not sustained by sufficient evidence.

IV.

Errors of law occurring at the trial and duly excepted to by plaintiff in error.

V.

Said court erred in denying plaintiff in error leave to file an amendment to its answer, setting up the adjudication of the defendant in error as a bankrupt.

VI.

Said court erred in refusing to substitute the trustee in bankruptcy of said defendant in error as party plaintiff in said cause.

VII.

Said court erred in permitting defendant in error to maintain this action in his own name.

33 VIII.

Said court erred in refusing to sustain the motion of plaintiff in error for judgment on the pleadings.

IX.

Said court erred in refusing to require the defendant in error to elect whether he would proceed in this cause under the Act of Congress of April 22, 1908, as amended, known as the Employers' Liability Act, or under the Constitution and laws of the state of Oklahoma.

X.

Said court erred in admitting incompetent, irrelevant and immaterial testimony on behalf of defendant in error, over the objection of plaintiff in error.

XI.

Said court erred in overruling the demurrer of plaintiff in error to the evidence of defendant in error.

XII.

Said court erred in excluding and refusing to admit competent, relevant and material testimony offered by plaintiff in error.

XIII.

Said court erred in refusing to instruct the jury to return a verdict in favor of plaintiff in error.

XIV.

Said court erred in permitting defendant in error to re-open his case after both parties had finally rested and the witnesses had been excused.

34

XV.

Said court erred in his instructions to the jury and especially in giving to the jury instructions Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 inclusive; and in giving each of said instructions.

XVI.

Said court erred in refusing to give to the jury the several instructions requested by plaintiff in error, and in refusing to give each of said instructions, as requested.

XVII.

Said court erred in receiving a verdict signed or agreed to by less than twelve jurors.

XVIII.

The verdict of the jury is excessive, appearing to have been given under the influence of passion or prejudice.

XIX.

Said court erred in permitting counsel for defendant in error to make improper and prejudicial argument and statements to the jury, and in not withdrawing said statements and admonishing counsel with reference thereto.

XX.

Said jury erred in improperly arriving at its verdict, the same being arrived at by lot.

XXI.

35 Said court erred in denying plaintiff in error's petition for a removal of said cause to the Federal Court for the Eastern District of Oklahoma.

XXII.

Said court erred in overruling plaintiff in error's motion for a new trial.

Wherefore, plaintiff in error prays that said judgment so rendered be reversed, set aside, and held for naught, and that plaintiff in error be restored to all rights that it has lost by the rendition of such judgment; and for such other relief as to the court may seem just and proper.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

36 (Filed June 11, 1913. W. H. L. Campbell, Clerk.)

In the District Court of Carter County, State of Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
versus
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Case-made.

Appearances:

For the Plaintiff, Stuart, Cruce & Gilbert, Cruce & Potter, L. S. Dolman.
For the Defendant, R. A. Klienschmidt, J. H. Grant, Harreld, Ward & Hutchison.

Filed Mar. 26, 1913. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

Exhibit "A."

37-41 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Case-made.

Appearances:
For the Plaintiff, Stuart, Cruce & Gilbert, Cruce & Potter, L. S. Dolman.
For the Defendant, R. A. Kleinschmidt, J. H. Grant, Harreld, Ward & Hutchison.

Filed Mar. 26, 1913. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

Exhibit "A."

42 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Case-made.

Be it remembered, That on the 13th day of April, 1912, the plaintiff, Harry A. Brown, commenced this action against the defendant, the St. Louis & San Francisco Railroad Company, by filing in the District Court of Carter County, Oklahoma, his petition in writing, which petition appears in the words and figures following, to-wit:

43 In the District Court Within and for the 8th Judicial District, Sitting at Ardmore, Carter County.

Number —.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, Defendant.

Petition.

Comes now the plaintiff herein, and for his cause of action against the defendant complains and alleges:

I.

That the plaintiff, Harry A. Brown, is a resident and citizen of Aylesworth, Marshall County, Oklahoma.

II.

That the defendant is and was at the times hereinafter mentioned, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and was at all times hereinafter mentioned engaged in the operation of a line of railway between the town of Hugo in the State of Oklahoma, and in and through the town of Ashdown to the town of Hope, in the state of Arkansas, and is and was at all times hereinafter mentioned a Common Carrier engaged in commerce between said town of Hugo and said Town of Hope, and was and is now operating a line of railway through Carter County, Oklahoma and has an agent
44 in said County and State upon whom service of summons can be had.

III.

That at all the times hereinafter mentioned the plaintiff, Harry A. Brown, was in the employment of said defendant as an extra brakeman, and was at all times hereinafter mentioned engaged as an extra brakeman running out of the town of Ashdown, Arkansas.

IV.

That on the 20th day of February, 1911, while engaged in cutting out and taking on cars in making up a regular train, destined for Hugo, Oklahoma, and while at the town of Ashdown, Arkansas, plaintiff was permanently injured, as will hereinafter appear, through carelessness and negligence of the said Tom Chamberlain, engineer engaged in making up said train.

That there was a passing track at said point leaving the main line and re-connecting with said line at a point at a distance sufficient to accommodate all trains in service upon said line. That said passing track had a switch connecting the same with a spur track running out to accommodate a mill some distance from said track. That neither said passing track or said mill track were ballasted and the ties stood up four or six inches from the ground, all of which was well known by said engineer and said defendant.

That said train had pulled in from said main line upon said passing track, and the engine and a few cars had been cut off from said train in order to pick up several cars standing on said
45 mill track, and said plaintiff was ordered and it was his duty to assist in picking up said cars on said mill track and said cars had been pulled out on said passing track.

That said plaintiff, as was his duty, and while acting within the scope of his employment, and as he was ordered, had signaled said engineer to stop and wait until plaintiff could throw the switch and arrange the knuckles on the end car so that it would couple on to the main train standing as aforesaid on the passing track.

That said engineer had stopped the train, and plaintiff had thrown the switch and stepped in between the rails and between the ties to fix the knuckle on the coupler as it was his duty to do, when said engineer, disobeying plaintiff's signal to wait, without warning or notice to plaintiff, suddenly and with great force, careless and negligently put said engine and cars in rapid motion and backed said cars upon plaintiff so suddenly and unexpectedly as to make it impossible for plaintiff to escape, and plaintiff was violently thrown across said rail and both of his feet crushed and maimed so that plaintiff sustained permanent injuries as follows:

Said plaintiff's right foot was crushed in the instep and toes and the bones broken therein so that the same protruded through the flesh causing said foot to become permanently drawn out of shape; that said muscles and tendons of said foot were permanently injured, bruised and strained so that plaintiff can never have full and free use of same.

That said left foot and ankle were crushed and maimed
46 so that a large portion of the bones of the ankle and foot were splintered and mashed so that it became necessary to

remove the same, thereby, totally disabling said foot and requiring plaintiff to use crutches in order to walk. That by reason of said injuries plaintiff suffered great physical and mental paid and anguish, and has been, ever since said injury, and is now, under the constant care of physicians and surgeons.

V.

Plaintiff further alleges that it became and was his duty to so arrange the knuckles upon the drawbars at the ends of the cars, that the same would couple by impact, and that while the cars on the mill track were being pulled out upon the passing track, he crossed over to the end car of the train left standing upon the passing track to open the knuckle thereon, but that the same was so defective that plaintiff was unable to open the same. Plaintiff then signaled the engineer as aforesaid to stop and wait while he opened the knuckle upon the rear car attached to said engine, and that said knuckle was so defective that it stuck and refused to open, and it was while so engaged that plaintiff was injured, as hereinbefore alleged, while he was in the exercise of due care and without fault or negligence on his part. That both of said cars were used by said defendant in interstate commerce and had couplers so defective that they would not couple automatically by impact, as required by the Act of Congress of March 2, 1893 (27 Stat. L. 531) as extended and amended by the Act of Congress of April 22, 1908, (35 Stat. L. 657) and that it was necessary for plaintiff in the perform-
47 ance of his duties as head brakeman to remedy the defects and go in between the ends of the cars and fix the same so that they would couple by impact.

VI.

That prior to said injuries plaintiff was a strong abled bodied man, competent to perform any of the services required of a railway brakeman, and had an earning capacity of $5.00 per day. That by reason of said injuries plaintiff is totally and permanently incapacitated to perform any of the duties of a brakeman, and his *dis*ability to labor at any occupation has been seriously impaired.

Plaintiff says that by reason of the foregoing negligence of defendant and its agents, he has sustained damages in the sum of $35,000.00, for which he sues herein, and he prays that upon final hearing he have judgment against defendant for $35,000.00, and he prays for costs and general relief.

STUART, CRUCE & GILBERT AND
S. A. BROWN &
L. S. DOLMAN,
Attorneys for Plaintiff.

Attorneys' lien Claim.

On the back of said petition appears the following endorsement: Filed Apr. 13, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

48-73 And afterwards, to-wit, on the 13th day of April, 1912, the plaintiff filed in said court his præcipe for summons, which præcipe appears in the words and figures following, to wit:

* * * * * * *

74 And afterwards, to-wit, on the 30th day of September, 1912, the defendant filed in said court its answer, which answer appears in the words and figures following, to-wit:

75 In the District Court.

STATE OF OKLAHOMA,
Carter County, ss:

H. A. BROWN, by S. A. BROWN, His Next Friend, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Comes now said defendant by leave of court first had and obtained and files this its answer to the petition of plaintiff herein, and answering says:

I.

It denies each and every allegation therein contained except such as are hereinafter specifically admitted.

II.

Defendant admits that it is, and was at the time set forth in plaintiff's petition, a railroad corporation duly organized and existing under and by virtue of the laws of the State of Missouri.

III.

Further answering and for further defense, defendant specifically denies that the said plaintiff, Harry A. Brown, was at the time of the accident in question, on the 20th day of February, 1911, engaged
76 as a brakeman on a freight train which made daily trips between Hugo, Oklahoma, and Hope, Arkansas; and defendant specifically denies that the said plaintiff was at said time engaged in the handling of interstate commerce, or that the train in question was engaged in interstate commerce, and defendant alleges the fact to be that the said train was a local train operating wholly within the state of Arkansas between Hope and Ashdown in said state.

IV.

Further answering and for further defense, defendant specifically denies that either or both of the cars described in paragraph 5 of plaintiff's petition was defective, or that the same were equipped

with couplers so defective that they would not couple automatically by impact as required by the Act of Congress of March 2, 1893, as amended by Act of April 22, 1908; and said defendant specifically denies that the said cars, or either of them, were not equipped with couplers and appliances in strict compliance with said Acts of Congress.

V.

Further answering and for further defense, defendant specifically denies that it was, or became the duty — the said plaintiff, or was necessary for him in the performance of his duties, to go in between the ends of the said cars in order to fix the same, or to make a coupling, and alleges that said cars and each of them, were properly equipped with operating levers by which the knuckles and couplers on the said cars, and each of them, could be prepared for coupling by impact by plaintiff while standing outside of the track, and without going between the said cars.

77

VI.

Further answering and for a further defense, defendant denies that the injuries, if any, sustained by the plaintiff were caused in any manner by the negligence of this defendant, and alleges that if his said injuries were caused or contributed to by any act of negligence save his own, it was the negligence of a fellow servant or fellow servants of the said plaintiff, for which the defendant would not be liable.

VII.

Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the said plaintiff, were due to and directly contributed to by his own negligence in the premises, in this to-wit: That the said plaintiff, while engaged as brakeman in assisting in the switching of cars at Ashdown, Arkansas, gave the engineer of the train in question a signal to back-up, in obedience to which the said engineer caused the engine and cars connected therewith to back, and the said plaintiff carelessly and negligently, in disregard of his own safety and the rules of the Company, went between two of said cars while they were moving, or in front of one of the cars while so moving, and in some way unknown to this defendant, slipped and fell upon the rails and was run over; that it was not necessary for the plaintiff to go between or in front of the moving cars, and that his act in doing so was in plain disregard of his own safety, and was the direct cause of his injury.

VIII.

78 Further answering and for a further defense, defendant alleges that at the time plaintiff secured employment with the defendant, as a part of the consideration of his employment by said company, he entered into a contract and agreement, signed by him, which has at all times since been in full force and

effect, and a copy thereof is hereto attached, marked Exhibit "A," and made a part hereof.

That in paragraph 12 of said contract it is provided as follows:

"In further consideration of such employment, I agree that if, while in the service of said company, I sustain any personal injury for which I shall or may make claim against the Company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a Superintendent, Claims Attorney, or Claim Agent of said Company, which notice shall state the time, place, manner and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid, shall be a bar to the institution of any suit on account of such injuries."

Defendant alleges that the said plaintiff has wholly failed, neglected and refused to comply with such provision of said contract, and has not given any notice in writing of his claim for the alleged injuries to the superintendent, claims attorney, or claim agent of the defendant, stating the time, place, manner and cause of his injuries, and the nature thereof and the claim made therefor; and defendant alleges that by the failure of the plaintiff to give such notice as is required by said contract, he should be barred from maintaining this suit, or recovering any damages thereunder.

79 IX.

Further answering and for a further defense, defendant alleges that at the time plaintiff secured employment with the defendant, he entered into a written contract, duly executed by him, as part consideration of securing such employment, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

That in paragraph 12 of said contract, it is stipulated and agreed as follows:

"I hereby certify that the foregoing statements are true, and hereby apply for a situation in the service of the St. Louis & San Francisco Railroad Company; and if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the General and Special Rules and Regulations of the department of service in which I may be employed, and faithfully observe the same, and keep advised of such amendments to said Rules and Regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntary or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said Company to make monthly deductions from my wages, in accordance with Circular No. 35 of June 29, 1899, and pay the same to the Employés' Hospital Association of the Frisco System; and if I am accepted as an employé, I authorize the deduction of one dollar to cover medical ex-

amination fee. I understand that standing in front of or getting onto an engine or car coming towards me is dangerous and is in violation of the rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car; and that it is dangerous to climb up and down the sides of cars while passing water tank spouts, sand-house pipes, coal houses, seed houses, cotton platforms, or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion is dangerous, and is forbidden by the Rules of the Company, and I
80 agree to refrain from so doing.

I understand that the duties of a brakeman expose me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others."

In addition thereto, plaintiff signed an additional paragraph on the last page of said agreement, recognizing that he was prohibited from going between cars.

That the plaintiff thereby agreed and undertook to assume the hazards and risks of his employment; that the occupation of brakeman on a freight train is necessarily a dangerous and hazardous one; that the plaintiff well knowing this fact, as aforesaid, applied for and secured employment with the defendant as such brakeman, and elected to remain in the employ of the defendant, with full knowledge of all the risks, hazards and dangers incident to his employment, and he thereby assumed such risks, dangers, and hazards; and defendant alleges that if the plaintiff was injured as alleged, such injuries were the direct result of a risk of his employment assumed by him, by reason of which he is not entitled to recover herein.

That among the rules promulgated by the defendant company, and in force on its lines, necessary for the safety of employés, were the following, which were well known to the plaintiff when he accepted employment of the defendant, and which, as aforesaid, he undertook and agreed to obey:

General Notice.

To enter or remain in the service is an assurance of willingness to obey the rules.

Obedience to the rules is essential to the safety of pas-
81 sengers and employés, and to the protection of property.

Employés, in accepting employment, assume its risks.

Rule No. 630. All persons entering into or remaining in the service of this Company, are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may re-

sult to them by reason of any act, negligent or otherwise, done by any person employed by the Company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

Rule No. 631. Each employé is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellow. Employés of every rank and grade are warned to see for themselves before using them, that the rolling stock, machinery or tools which they are required to use, are in safe condition, or that they are so put before using them.

Rule No. 632. The company does not require or expect its employés to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.

Rule No. 634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it danger- to expose the hands, arms or person of those engaged in coupling cars, all employés will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

Rule No. 636. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen, will be obeyed when obedience to those signals on the part of the engineman or fireman is essentual to *to* safety of an employé in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position—otherwise, without such knowledge he assumes all risks of danger arising from any misunderstanding or disregard of signals.

82 Rule No. 637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed or go between cars in motion to uncouple them, or to follow other dangerous practices."

That the plaintiff thereby assumed the risks incident to his employment; that his injuries, if any, were sustained as an incident of such risks, by reason of which he is not entitled to recover herein.

Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the plaintiff, were directly due to his own negligence and want of care in this, among other things, to-wit; that he carelessly and negligently violated the provisions of his written contract of employment heretofore referred to, and also all or part of the following rules and regulations of the company, to-wit:

Rules Nos. 63*p*, 631, 632, 634, 636 and 637, which said rules have heretofore been set out in paragraph IX hereof; and defendant alleges that if the plaintiff had observed said rules, he would not have sustained any injuries; that he could have performed his duties as brakeman, with entire safety to himself; that it was not

necessary for him to go between cars, or to go in front of a moving car; nor was it necessary for him to operate, or attempt to operate, or adjust the couplers or knuckles on the car or cars in question, while he was between cars or one the track; that the plaintiff in doing these acts, or either of them, was acting in direct violation and disregard to the rules and regulations od the defendant,
83 which had been established for his own safety, as well as said agreement; and that if he was injured while so doing, he was guilty of contributory negligence, directly causing such injuries, by reason of which he is not entitled to recover herein.

Wherefore, having fully answered, defendant asks to be hence discharged with its costs.

R. A. KLIENSCHMIDT,
FRED E. SUITS,
HARRELD, WARD & HUTCHISON,
Attorneys for Defendant.

84 Attached to said answer and marked Exhibit "A" appears the following:

Received
Apr. 13, 1910.
Trainmasters' Office,
Hugo, I. T.

Frisco.

Application for Employment.

Instructions.

All applications for employment as agents, operators, station baggagemen, engineers, firemen, engine hostlers, conductors, brakeman, train baggagemen, yardmasters, assistant yardmasters, switch foremen, switchmen, switch tenders, signal men, tower men, yard flagmen, bridge tenders, flagmen, gatemen, section foremen, railroad crossing flagmen, bridge foremen, watchmen and such other employes as may be designated by the General Superintendent or General Superintendent of Motive Power, must be made by the applicant himself, in duplicate, on this blank. The applicant will then report to the Company's Surgeon to have his sight and hearing tested, and when position applied for is in the engine, train or switching service, for a physical examination also. Surgeons making such tests and examinations will report result of same in proper place on this blank, sending one report to the Divisions Superintendent or General Superintendent of Motive Power, and the other to the Chief Surgeon. A fee of one dollar will be charged
85 for making such examinations.

All persons engaging in the service of this Company in a capacity in any way connected with the Transportation Department are hereby instructed and notified that they must not enter upon

their duties until they have first read and fully understand all the General Rules and Regulations in the Book of Rules and Regulations, Operating Department, and the Special Rules attached to the Current Time Table.

March 4th, 1910.

To Mr. F. D. Hohnsbeen, Ass't Supt., Hugo, Okla.

1. My full name is Harry Augusta Brown.

2. When born Dec. 9th, 1887. Where born Ardmore, Okla. weight 180# Height 5 ft. 11 in. Complexion dark. Color Hair brown. Color Eyes gray.

3. Name of wife, if living (if unmarried, so state) Roberta M. Brown. Residence, Aylesworth, Oklahoma.

4. Name of father and mother, if living S. A. Brown, M. C. Brown, Residence, Aylesworth, Oklahoma.

5. If unmarried and parents not living, name and address of nearest relative——

6. Names and addressed of any persons dependent upon you for support, or to whose support you are contributing Roberta M. Brown, my wife.

7. Occupation previous to engaging in railway service Bookkeeper.

8. Cause of leaving last situation (explain fully) Wish to take up outdoor work.

(If you have ever been in the service of this Company
86 state what length of time, in what capacity, where, when and why you left it) Never in their service.

9. State what railroad experience you have had, giving names of roads, in what capacity employed, length of service on each road. If you have not previously been employed by a railroad company, state by whom and when and where-n you were employed. (Applicant must here give his history for last five years, beginning with his position of five years ago, and giving each year in regular order down to date.)

Name of railroad or other employer.	Town or city at which employed.	Name of State.	Name and present address of employer.
Wessly Peacock	San Antonio	Texas	San Antonio, Tex.
Capt. Literia	Sherman	"	Sherman "
G. R. Smith,	Gainesville	"	Gainesville "
S. A. Brown	Aylesworth,	Okla.	Aylesworth, Okla.

What was your occupation.	Date you entered their service.	Date you left their service.
In school,	Oct. 7, 1904	May 12, 1906
" "	May 12, 1906	June 1, 1907
" "	June 5, 1907	Dec. 20, 1907
Bookkeeper.	Jan. 2. 1909	Feb. 10. 1910.

10. Have you ever been discharged or suspended from any situation? If so, state particulars, when and where? No.

11. Have you ever been injured? If so, when, where, how and extent of injury? No.

12. Have you now, or did you ever have any litigation with any railroad company? No.

87 In consideration of my employment by said Company, I further agree that whenever I shall sustain any personal injury while in the service of said Company, either upon lines of road operated by it, or by any company with which it shall have train, track or running arrangements, or while in the service of any company, with which it shall be united in a so-called railway system, I will allow the surgeons of the Company in whose service I may so be, and any medical examiners selected by it, to examine my person and body as often as the Company may deem necessary; and, in the event of any suit or action against any of such companies for injuries received, or for death resulting therefrom, I hereby agree, in consideration of my said employment, that any surgeon, physician or medical examiner, who may have attended or examined me while in the employ of any of the aforesaid companies, or at any time prior or subsequent thereto, may testify as to all facts in his knowledge, whether derived from the confidential relation of physician and patient or not, and I hereby waive all objections to any such surgeon, physician or medical examiner so testifying whenever called upon by any of the aforesaid companies, and further agree that refusal to allow any such examination to be made, or such testimony to be given, shall be a bar to the institution or prosecution of any action on account of such injuries, and any such action, pending at the time of such refusal shall at once abate in consequence thereof.

88 In further consideration of such employment, I agree that if, while in the service of said Company, I sustain any personal injury for which I shall or may make claim against the Company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a Superintendent, Claims Attorney or Claim Agent of said Company, which notice shall state the time, place, manner and cause of my being injured and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.

If, however, the laws of the state or territory within which such injury may be sustained shall require the giving of notice of injury, then such notice shall comply with such requirements. If the laws of the state or territory within which such injury may be sustained provide that a contract or agreement for the giving of such notice, within less than a stated period, shall be void, then the applicant agrees to give notice of injury within the minimum period designated by such act or acts, and as provided herein; if no provision be made therein, then such notice to be given as proved herein.

In further consideration of such employment, I hereby authorize this company and its officers and the officers of any other company or firm by which I have been heretofore employed, to answer any or all inquiries as to my conduct and qualifications while in such

service, and, so far as they may know, the cause of my leaving the same.

I further agree that if under my employment I shall be
89 called upon to work or run on the lines of any company with which the employing company shall have train, traffic or running arrangements, or if I shall be called upon to work or run on any line of road with which it shall be united in a so-called railway system, all the conditions, obligations and provisions of this instrument shall be held to be for the benefit of, and to have the same force and effect as if made directly with such other company, line or road; and in case of injury on such other line or road or part of such system, I agree to give the notice hereinbefore provided for to a Superintendent thereof, and also to the Claims Attorney or Claim Agent of the employing company, or as may otherwise be provided by law.

In consideration of such employment, I further agree that the aforesaid provisions respecting medical examinations, the waiver as to giving of testimony by surgeons, physicians or medical examiners, and the giving of notice of personal injuries shall be binding upon my assigns, heirs, administrators and executors, as well as upon myself.

I hereby certify that the foregoing statements are true and apply for a situation in the service of the St. Louis and San Francisco Railroad Company; and if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the General and Special Rules and Regulations of the department of service in which I may be employed, and faithfully observe the same,
90 and to keep advised of such amendments to said Rules and Regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntary or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said Company to make monthly deductions from my wages in accordance with Circular No. 35 of June 29, 1899, and pay the same to the Employes' Hospital Association of the Frisco System; and if I am accepted as an employe, I authorize the deduction from the first wages earned the sum of one dollar to cover medical examination fee. I understand*ing* that standing in front of or getting on to an engine or car coming towards me is dangerous and is in violation of the Rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car; and that it is dangerous to climb up and down the sides of cars while passing water-tank spouts, sand-house pipes, coal houses, seed houses, cotton platforms, or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion is

dangerous and is forbidden by the Rules of the Company, and I agree to refrain from so doing.

I understand that the duties of a brakeman exposes me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others.

91 Should I enter the service pending the approval of my application, and said application be not approved, I agree to be removed at once and without complaint.

I have carefully read the foregoing and that portion of the time table of the Red River Division of the St. Louis and San Francisco Railroad Company which specifies the bridges and overhead structures which will not clear a man standing on top of a car, and agree on my first trip over the road to particularly familiarize myself with their location and take no risks.

(S.) H. A. BROWN, *Applicant.*

My present address if Aylesworth, Okla.

F. D. HOHNSBEEN, *Ass't Supt.*

Witness:
(S.) J. W. WOMBLE.

Applicant approved for employment as —.

—— ——.

NOTE.—This application must be filled out by applicant in presence of and witnessed by the head of the Deppartment (or his deputy) in which the applicant is to be employed. Copy must be sent to Chief Surgeon.

Surgeon's Certificate of Examination.

This examination must not be made except by especially designated Examining Surgeon.

of H. A. Brown.
Occupation brakeman. Age 22 yrs.

92

Vision.	Color sense.	Hearing.
Right eye 20	Give number of skeins selected to match test skein "A"	
Give last five letters read at 20 feet AR-DZ	3-5-7-9-11-13-15-17-19	
Left eye	Give numbers of skeins selected to match test skein "B".	Right Ear, watch 36 whisper 20.
Give last five letters read at 20 feet.....	21-23-25-27-29.	

Combined	Give numbers of skeins selected to match test skein "C". 31-33-35-37-39.	Left ear, watch 36 whisper 20.

For red Normal.

For Green Normal.

What is rate of pulse? 74 of Respiration? 18.
What disease has he suffered from? Nothing.
Has he ever suffered from hernia? No.
Has he ever suffered from injury? No.
Is he the subject of any deformity, from injury or otherwise? No.

Has he any present source of disability in

(Applicants should be st-ipped for this examination. Note with care varicose veins, enlarged joints and anything tending to produce or prolong disability.)

Heart. No.
Lungs. No.
Kidneys. No.
Joints. No.
Veins. No.
Feet and legs. No.
Hands and arms. No.
Spine. No.
Urinary organs.

Does he use intoxicating liquors? No. Is his appearance that of a temperate man? Yes.

Has he had small-pox? No. or been recently vaccinated? Yes. his height is 5 feet 10½ inches; weight 180 pounds; color of 93 eyes gray of hair brown. He is physically average. I recommend him for position as brakeman.

(Signature) H. H. WHITE,
Per W. M. JOHN, *Surgeon.*

Examined at Hugo.
(Signature) (S.) H. A. BROWN, *Applicant.*
Date April 10, 1910.

I have carefully read that portion of the time table of the Red River division of the St. Louis & San Francisco Railroad which specifies the bridges and overhead structures which will not clear a man standing on top of a car, and agree on my first trip over the road to particularly familarize myself with their location and take no risks.

(S.) H. A. BROWN.

J. W. WOMBLE, *Witness.*

I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion

is dangerous, and is forbidden by the rules of the Company, and I am to refrain from so doing.

(S.) H. A. BROWN.

Witness:
J. W. WOMBLE.

On the back of said answer and attached exhibit appears the following endorsement:
Filed Sep. 30, 1912. S. F. Haynie, Clerk District Court, Carter, County, Oklahoma.

94 And afterwards, to-wit, on the 12th day of October, 1912, the plaintiff filed in said court his reply to the answer of the defendant, which reply appears in the words and figures following, to-wit:

95 In the District Court within and for Carter County, Oklahoma.

H. A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Reply.

Comes now the *defendant* herein, and for his reply to defendant's answer filed herein denies each and every, all and singular the allegations set out therein, save and except such allegations as admit of the truth of the allegations set out in plaintiff's petition, and save and except such allegations as are hereinafter specifically admitted.

I.

Plaintiff admits that he signed an instrument denominated "application for employment," referred to as exhibit "A," in paragraphs eight and nine of defendant's answer. That said application consists of questions to be answered by all applicants for employment in large type as to age, relationship, previous service and experience, and that there is printed therein at the end of the same in small and unconspicuous type the clause set out in said paragraphs eight and nine of defendant's answer, with other provisions, the consideration of which is stated to be the "employment" of plaintiff,
96 and while said clause states that plaintiff has "carefully read" the same, plaintiff has no recollection that he either read the same or had his attention called to the same at the time he signed it, and alleges the truth to be that he was not employed by defendant until long afterward. Plaintiff says that said application was executed at Hugo, Oklahoma, and was for services upon the lines of defendant company, with which said defendant had traffic arrange-

ments, and the purposes and intent of said clause was to enable said defendant company to exempt itself from liability created by the Acts of Congress referred to in plaintiff's petition, and particularly the Act approved April 22nd, 1908, and is by the terms of said act void and of no effect. That said clause further violates sections 8 and 9 of said article 23 of the Constitution of the State of Oklahoma, and is therefore void. For a further reply to paragraph 8 and 9 of defendant's answer, plaintiff says that immediately upon being injured, as set out in plaintiff's petition, he was taken by the officers, agents and employees of said defendant company to the Company Hospital at St. Louis, Missouri, and there kept under the care and control of the surgeon and nurses of defendant Company from the time of said accident until May 1st, 1911, where he was visited at various times by the claim agent of said defendant Company, seeking a settlement from plaintiff of his claim against said defendant, and that during said time and as soon after the accident as said defendant's surgeons and nurses would
97–106 permit, said defendant's claim agent procured oral and written statements from plaintiff of the time, place, manner and cause of the injury, and the nature and extent of such injuries, so far as defendant's surgeons had explained them to plaintiff. That said defendant's surgeons and nurses permitted said defendant's claim agent access to this plaintiff immediately after he came out from under the influence of anesthetics, and while he was suffering intense physical and mental pain from the effects of said injuries, and the operation required thereby. That said claim agent continued to importune plaintiff for a settlement of his claim for damages against said company up to the time he left said hospital on May 1st, 1911, and subsequent thereto many letters passed between plaintiff and plaintiff's attorney and said defendant in an effort to get said defendant to pay plaintiff his claim for damages against it, whereby said defendant has waived any specific compliance with the terms set out in said clause of said application.

STUART, CRUCE & GILBERT AND
L. S. DOLMAN,
Attorneys for Plaintiff.

On the back of said reply appears the following endorsement: Filed Oct. 12, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

* * * * * * *

107 And afterwards, to-wit, on the 9th day of December, 1912, the defendant requested the Court to require the plaintiff to elect on whether he would stand on the federal Employers' Liability Act, or the Statutes of the state of Oklahoma, which Motion was made orally, and appears in the words and figures following, to-wit:

By Mr. Klienschmidt: Comes now the defendant and requests the court to require the plaintiff to elect on whether he will stand on the federal Employers' Liability Act or the statutes of the state of Oklahoma.

By Mr. Cruce: If the testimony in this case shows, after we get

through—they have all their witnesses here—if the testimony shows they were not engaged in Interstate Commerce, then we will ask leave of the Court to amend our pleadings to conform to the proof.

108 And afterwards, to-wit, on the 10th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said court, this cause came on regularly for hearing before the Honorable Stillwell H. Russell, Judge of said Court, the plaintiff appearing in person and by A. C. Cruce, W. I. Cruce, W. D. Potter, L. S. Dolman and S. A. Brown, his attorneys, and the defendant appearing by R. A. Klienschmidt, J. H. Grant and J. W. Harreld, its attorneys, and both sides announcing ready for trial, and a jury being called for, a jury composed of twelve good and lawful citizens and residents of Carter County, Oklahoma, were duly selected, impaneled and sworn to try the issues in this cause, and thereupon the following evidence was offered and introduced, in the order following, to-wit:

Plaintiff's Evidence.

HARRY A. BROWN, called as a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. Harry A. Brown.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. How old are you?
A. I was twenty-two years old yesterday.
109 Q. Where were you raised, Mr. Brown?
A. West of Ardmore here, about, I suppose, twelve miles.
Q. On the old Sam Brown farm?
A. Yes sir.
Q. Where are you living now?
A. Aylesworth, Oklahoma.
Q. Are you a married man?
A. Yes sir.
Q. What road is this that runs from Ardmore to Madill?
A. The Frisco.
Q. St. Louis & San Francisco Railway?
A. Yes sir.
Q. Does it run through Hugo?
A. Yes sir.
Q. And on to Ashdown, Arkansas?
A. Yes sir.
Q. And how far on east from there?
A. To Hope, Arkansas.
Q. What does it haul; passengers and freight?
A. Yes sir.

Q. From one state to another?
A. Yes sir.
Q. Were you ever in the employ of the defendant company?
A. Yes sir.
Q. When did you make application for that?
A. It was sometime in April, 1910.
Q. Did you undergo an examination? You made an application for what position?
A. Brakeman; I expected to work my way up.
110 Q. Did you expect to make railroading your life occupation?
A. Yes sir.
Q. Does the Company, or do you know, require examinations of parties desiring to enter its employ as brakemen?
A. Yes sir.
Q. Did you stand such examination?
A. Yes sir.
Q. Did you pass it?
A. Yes sir.
Q. Do you know what kind of an examination you passed, whether high or low?
A. I don't know; it seemed to be satisfactory; I was passed.
Q. You went to work for them about in July, you say?
A. Yes sir.
Q. Where did you work for them?
A. I worked for them out of Hugo.
Q. To what places?
A. To various places. Sometimes to Madill, sometimes to Ardmore, and sometimes into Arkansas, and sometimes into Sherman, Texas.
Q. As a brakeman?
A. Yes sir.
Q. Were you head brakeman when you first entered their employ?
A. I believe the first trip I ever made was as head brakeman.
Q. Did you keep the position as head brakeman?
A. I was changed about; I was braking extra.
Q. How long before that injury had you been the head brakeman?
A. All the time I had been on that line.
111 Q. How long was that?
A. Some four days.
Q. Well, what are the duties of the head brakeman, some of them?
A. Well, it is called what you call, following the engine; railroad men give it that term. You couple and uncouple the engine from cars, line switches, and giving and taking signals.
Q. Do you know what a switch sheet is?
A. Yes sir.
Q. What is that?
A. That is a list that has places—columns—for car numbers on it, and also the track numbers, and it has a list that is made out

by either the clerk or the way-master, or the agent at the station wherever it may be, for the certain locations of the cars, what cars are to be picked up and cars to be spotted.

Q. Where they go?

A. Yes sir.

Q. Did they have a way-master at this station, Ashdown?

A. No sir.

Q. Who made up the list there?

A. The agent made it up.

Q. Were you in the employ of the defendant company on the 20th of February, 1911?

A. Yes sir.

Q. Where were you on that day?

A. I came from Hope, Arkansas, to Ashdown, Arkansas.

Q. What time did you get to Ashdown?

112 A. It was between 10:30 and 10:45 in the morning.

Q. What kind of track there, and how many tracks has the defendant Company at that place?

A. They have a passing track.

Q. Have they a main track there, first?

A. Yes sir.

Q. Which direction does it run?

A. East and west, and passing track running east and west, and they have a connection with a road there, I forget the name of it; I am told it was formerly a log road, and also they have a mill, spur, that goes to the staving mill.

Q. You say there is another road there that is called a log road?

A. Yes sir, called that now.

Q. Which direction does it run?

A. Northeast.

Q. That has nothing to do with this suit?

A. No sir.

Q. Just leave that out. Can you make a diagram that will give us some idea about how the main track and the passing track and the spur track runs? Look at that map right carefully now, and see if that is substantially correct map of the location?

A. Yes sir, it is to the best I remember it, only I didn't know that this staving mill track here connected with the P. & G.

Q. This is the main line (indicating)?

A. Yes sir.

113 (The map referred to was here identified as plaintiff's Exhibit A.

Q. Now, do I understand you, there is a main line there, running east and west?

A. Yes sir.

Q. And just north of that is the passing track?

A. Yes sir.

Q. Now, north of the passing track is the line that runs by the stave mill, out northwest, and connects with the M., P. & G.?

A. It runs out by the staving mill; I didn't know it connected there.

Q. You knew it ran out by the staving mill?

A. Yes sir.

Q. That is what you call the spur?

A. Yes sir.

Q. Now, on this day in question, what day in February was it?

A. 20th day.

Q. What instructions, if any, did you receive about making up a train there?

A. Well, when we pulled in on the main line, the best I remember, it was on the main line, why, we all started to the depot. What I mean about that, it seems to me like the conductor and the swing brakeman and myself; there could have been others along.

Q. Who was your conductor?

A. Joe Pierce.

Q. Who was the other man that was along?

114 A. Dan Godbold.

Q. What do you call him? The swing brakeman?

A. Yes sir.

Q. What do you mean by that?

A. He is the man that works in the center and handles the switch list.

Q. The swit-h list you spoke of awhile ago?

A. Yes sir.

Q. Well, go ahead.

A. He beat me in the depot, and I stopped out at the entrance, and was talking to Mart Sanders, exchanged good morning with him.

Q. Who was he?

A. He was the conductor that was making up the train to go to Hugo.

Mr. Klienschmidt: If the Court please, I move to strike out the answer of the witness, that he was making up a train to go to Hugo, as not responsive to the question.

The Court: Sustained.

A. Godbold came out to me and says, bring the engine out on the mill train; he says, we have got to make up the Hugo train.

Mr. Klienschmidt: We move to strike that out as not responsive to the question, because he is asked what was done, and not what was said. It hasn't been shown that this man Godbold, who was a fellow brakeman, had any right to give him any instructions. We make the further objection that they cannot prove the character of this train by the statement of a brakeman; that is not the

115 best evidence, and that it is not material to the issues of this case, what the character of this train was, the material issue being, what was the character of the cars that he was handling at the time of the accident.

The Court: I will let the answer stand as it is.

To which action of the Court, the defendant then and there excepted.

Q. What was it you said he said?
A. He came out of the office, and he says to me, cut off the engine and bring it onto the mill; he says, we have got to make up the Hugo train so they can go out after the rest.
Q. What do you mean by the rest?
A. When they come in off the run, they have eight hours rest for every sixteen hours work.
Q. What hour in the day was this?
A. I don't know, but it seems to me it was up around 11 o'clock.
Q. Where is Hugo?
A. In Oklahoma.
Q. And you were then in Ashdown, Arkansas?
A. Yes sir.
Q. What did you do, in compliance with that statement?
A. We went through the necessary requirement to follow the instructions on the switch list and make up the train.
Q. This man, Godbold, he had the switch list. Now, what did you and he do? Who was the engineer in the engine?
A. Tom Chamberlain.
Q. Which direction was that engine pointing?
116 A. Headed west.
Q. Now, what did you and Chamberlain and Godbold do?
A. Godbold walked on over—there seems to be a cotton platform there—and he jumped through the cars and came to the mill track.
Q. That is the spur?
A. No, not the staving mill spur; that is the oil mill spur. I went across and——
Q. You were running the engine?
A. No sir, I was following it. The engineer was running it.
Q. You were giving the signals?
A. Yes sir. I brought the engine back in on this oil mill spur and we did quite a little bit of switching over there, over onto the passing track, taken on some cars and put out some. When we got through our switching there, we went down the passing track.
Q. Where was these cars that you took off the oil mill track?
A. I judge they were going to Hugo?

Mr. Kleinschmidt: We move to strike that out as not responsive to the question and purely guess work.
The Court: That part where he judges where they were going is stricken out.

Q. Godbold, you say, was giving directions from the switch list?
A. Yes sir.
Q. And his statements to you were that you were making
117 up a train that was going to Hugo?
A. Yes sir.
Mr. Klienschmidt: I object to that question.
The Court: Don't lead the witness.

Q. After you had switched these cars off of the oil mill track, what did you do?

A. Put them onto the passing track, back down to the staving mill switch.

Q. What is the staving mill switch? Is that the one you call the spur?

A. Yes sir, that is the switch you have on the map there.

Q. Now, you have the main track and the passing track and then the spur?

A. Yes sir.

Q. You came back on the spur then?

A. Yes sir.

Q. What did you do there?

A. We taken on cars.

Q. How many cars were on that spur?

A. When we went in there, I judge there was somewhere between four and seven; I don't know exactly.

Q. What did you do?

A. We went in there and got some of them, practically got them all, I think, pulled the entire switch clear, and brought them out to the passing track, put some in our train, taken some back and spotted them, and did various switching that had to be done.

Q. What do you mean by your train?

118 A. Well, sir, the train that we were making up for the Hugo crew.

Q. That was the train you were making up. You went out on the spur and got, first, all the cars off of the spur?

A. I wouldn't be positive; it seems to me it were.

Q. At least, you got a number of them?

A. Yes sir.

Q. Put them on the passing track?

A. Some of them; some back to the spur.

Q. Then go ahead and state what you did?

A. We finished our switching there.

Q. What was the last thing you did before leaving that spur, just before you were hurt?

A. When we got through our switching on the staving mill track——

Q. I thought you were going to call that the spur?

A. Well, on the spur. We backed back into the spur and spotted some cars.

Q. What do you mean by spotting a car?

A. If you wanted a car up to the cattle shed, or holding dock, you would put it to the particular place you wanted it, and you would call that spotting.

Q. Spotted a lot of cars on the spur?

A. Yes sir.

Q. Well, go ahead.

A. I got the car, however, the one that I got hurt from, or cut the other one off from it, and I don't know just how many there were left in on the spur, but I cut that car off and I gave the

119 engineer the go ahead signal.

Q. When you cut it off, that car was then attached to the cars that the engine was on?

A. Yes sir.
Q. Pointed west?
A. Yes sir.
Q. And you did what?
A. Gave the engineer the go ahead signal.
Q. What did he do?
A. He pulled up to the passing track. I put my foot up on the back end—he was going slow—and I stepped off and walked over on the map you have there to the passing track to this cut of cars on the passing track.
Q. Were there some cars on the passing track then?
A. Yes sir.
Q. What were those cars?
A. It was the train we were making up.
Q. Well, now, those cars were on the passing track?
A. Yes sir.
Q. Were they east or west, then, of the point where the spur connects with the passing track?
A. They were east.
Q. Now, go ahead.
A. I wal-ed over to the west end of this cut of cars that was on the passing track and tried this knuckle.
Q. What knuckle?
A. The west knuckle.
Q. The west end knuckle?
120 A. The west end knuckle that was on the cars on the passing track, that we were making up.
Q. What did you want to open the knuckle for?
A. It is necessary to open the knuckle, one of them at least, when you are going to make a connection between two cars.
Q. Is there a knuckle on each end of a car?
A. Yes sir.
Q. And if you want to put two cars together, one car that is fronting west, if you want to connect that to a car on the east of you, you either have to open a knuckle on the west of the east car or the east end of the west car?
A. Yes sir.
Q. You went there to open this knuckle on the west end of this car?
A. Yes sir.
Q. What did you do? Was there a lever there?
A. Yes sir.
Q. Would it work?
A. No sir. I tried the lever. It wouldn't work and I tried the knuckle with my hand, and it only gave a portion of the way out, and I adjusted it back then and closed it.
Q. Which side of that car was this upon? Was that left open on the north or south side?
A. The north side.
Q. Now, on this car that you first tried to open the knuckle on, the lifting lever was on the north side?

121 A. Yes sir.

Q. And you say you couldn't get that open?

A. No sir.

Q. Why couldn't you?

A. It was some defect in the couple some way.

Mr. Klienschmidt: That is objected to and asked to be stricken out as a conclusion of the witness.

The Court: Sustained.

Q. Would it work or not?

A. No sir.

Q. Did you try to work it?

A. Yes sir.

Q. Then what did you do?

A. I turned around, facing west on the north side of the passing track, and gave the engineer the stop signal.

Q. Where was he then?

A. He was in the cab?

Q. I mean where was that train, the east end of the train?

A. When I gave him the stop signal, the train was just pulling through the switch, the hind truck of the car was just about half way over the switch.

Q. You mean where the track connects with the passing track?

A. Yes sir, and it takes sometime to stop there, and by the time he stopped, he was somewhere between four and seven feet, to the best of my judgment, west of the spur switch.

Q. West of where the spur——

A. Intersects the passing track.

Q. Then what did you do?

122 A. I gave him the stop signal and I walked on up—it wasn't but about three steps, or something like that—and lined the switch.

Q. What do you mean by that?

A. Turned the switch in order to make a connection with the track.

Q. You turned the switch so when the cars came back it would go straight back and couple on the passing track?

A. Yes sir.

Q. Then what did you do?

A. I gave him a spot sign.

Q. What does that mean?

A. It means to stay there until you get a signal, the way I understand it, from the party that gives it.

Q. Where was the engineer at that time?

A. He was in the cab.

Q. Could you tell which way he was looking?

A. He was looking at me.

Q. How long after you gave him the sign to stop, how many seconds was it before you gave him the sign the stay there?

A. I couldn't put it into seconds, but I lined the switch and I

suppose it takes five or ten seconds to line a switch; may be not so long.

Q. Was the car still then?

A. He was stopped just about the time I got the switch lined.

123 Q. Then what did you do?

A. When I gave the spot sign and I saw that he saw me, I turned to the left——

Q. Which way was that?

A. South. Passed south to go across the track to get the lifting pin.

Q. What did you have to go across the track for?

A. To get the lifting pin.

Q. Where was it?

A. On the south side of the car.

Q. And you were on the north side?

A. Yes sir.

Mr. Grant: We object to these leading questions.

The Court: That is objectionable.

Q. Well, go ahead?

A. Well, I went across the track to get the lifting pin. I took hold of the lifting pin and it wouldn't work the knuckle; gave it a lift like that and it wouldn't work the knuckle. When I seen it wouldn't, I put my right hand on the knuckle that was in the draw bar in the east end of the car, to adjust it like that, to open it, and just as I got my hand on that knuckle, the lever had never given way, and just as I got my hand on that knuckle, I heard the motion of the cars, the engine taking the slack, and heard them coming back, and I stepped out to the left. I could have stepped out to the right, but in so doing I was partially on the south of the

124 track already, because I had my hand clean out to the side, on the lifting pin, and in so doing, I could turn a little less than half way round and be almost out on the left hand side. If I got out on the north side, I would have to cross two thirds of the track to step out on the north side, and as I put my hand on that knuckle, he came back, and the car hit me in the side, like that, and it knocked me in this position, and I started to step out, that knocked me down full of my back. The rail was right across there and I realized what was going to take place if there wasn't something did. I rolled, I couldn't tell just how far, but I rolled over and when I rolled over, it seemed like my foot was fastened in something and it caught my foot together like that, in the shape like this, and the car wheel caught me and ran over me.

Q. What was done then?

A. Well, sir, when the car wheel ran over me, the best I remember, I got out after the first wheel passed over me; I jerked them out, or I suppose I did. They were out, and I turned over on my hands and knees—I couldn't stand the misery, and the pain got so severe, I just turned over and laid down, and the next I knew, Dan Godbold—I couldn't tell how long I had been on the ground, but it

wasn't very long—Dan Godbold came between the cars, it
125 seemed to me he came between the west end of the cars that hit me; he jumped through the cars and it seemed like he was crying, or fixing to cry, and he said, my God, Harry, and that is the last time I saw him until he came back with more aid.

Q. What was done with you? What did they do with you then?

A. Well, the train crew came, and also some of the Hugo crew, Mart Sanders, Bill Smith and Harry Beard, the fireman on the engine that I was working with; I don't know how many. They picked me up and put me in the caboose—they brought the caboose around to me, and put me in this caboose and carried me up somewhere up there in town, I couldn't tell where the caboose was stationed, but it was somewhere near the depot, and Mart Sanders was asking for orders to leave the train out and bring me to Hugo.

Q. Did they take you to Hugo?

A. Yes sir.

Q. What time of the day was this injury?

A. Well, sir, I looked at my watch, and it was fourteen minutes to eleven o'clock when we were pulling out of this switch, when I was walking over to make up the car.

Q. What kind of a car was this you were run over by?

A. An empty stock car.

Q. That is, a car used in general use shipping stock you mean, from one point to another?

A. They handle lumber in them too.

Q. Harry, now, when this car that ran over you, that was on the west end of the cars that were attached to the engine, when
126 it stopped on the passing track and you gave him the signal to stay there, how far was that car from the car back east on the passing track, which you were going to couple onto?

A. Well, sir, it wasn't very far.

Q. About how far?

A. Well, I would judge somewhere in the neighborhood of thirty-six or forty feet; something like a car length. It was far enough—you can judge for yourself—it was just past the clearance, past where it would be clear for two cars to pass one another.

Q. You would say it was as far apart as the length of a car? That is your judgment?

A. Yes sir.

Q. Now, this injury occurred then somewhere about eleven o'clock. They brought you to Hugo. What time did you get to Hugo?

A. They told me it was about four o'clock. It wasn't four when we drove in there.

Q. What was done when you got there?

A. I was put in some kind of a vehicle.

Q. Were you operated on there?

A. Yes sir, carried up to Dr. Johns' office.

Q. What was done there?

A. I was put under the influence of ether immediately on arriving there, and the next thing I knew was when my father came that

night, about 11 o'clock he tells me, and I remember him
127 being there, something about it, and the next thing I remember was being put in the baggage car, and they were kinder in a hurry, for fear they wouldn't catch the train.

Q. Put in a baggage car and taken where?

A. St. Louis.

Q. What was your condition? Was there any suffering? Were you feeling easy?

A. Nobody don't know how I did suffer. I hurt mighty bad.

Q. What time did you get to St. Louis?

A. It seemed to me we got to Tioga Station in St. Louis the following evening, about seven o'clock.

Q. On your way to St. Louis, was there any particular suffering you went through?

A. Yes sir, I suffered mighty bad, and besides, I couldn't get my water to run off; it wouldn't work.

Q. Kidneys wasn't working?

A. No sir.

Q. How did you get the water from them?

A. I was put on the train that morning and some place in Missouri, I forget where, the water was drawn off.

Q. When did your kidneys act again?

A. In St. Louis.

Q. Did they act, or drawn off?

A. Drawn off.

Q. Did that make you suffer or were you easy?

A. It hurt mighty bad.

Q. When you got to St. Louis, where were you taken?
128 A. To the Frisco Hospital.

Q. What was done there? Just tell in your own way.

A. I was carried down in the receiving room, or dressing room, I guess you would call it, and my clothes were taken off and my feet were dressed. I was bathed and carried up to a room, a surgical ward.

Q. What was done?

A. Well, that night I didn't sleep hardly any at all, and I believe it was the next day, it seems to me like, about ten o'clock, I wouldn't be definite as to the time, but I was prepared for operation, taken into the operating room, went under ether again, was operated on, and the next thing I remember, sometime the following morning, about two o'clock, about waking up and vomiting.

Q. Do you know what the doctor,—surgeon,—did at either place?

A. No sir, only what I was told.

Q. By them?

A. Yes sir.

Q. What did they say, if anything, about removing bones?

A. Dr. Johns just held up his hand and said he had taken his hand full of bones out of my left foot.

Q. Did you see the bones?

A. No sir.

Q. How long were you in the hospital?

A. I got there on the night of the 21st of February and left there the night of the first day of May, I believe it was; either the first day of May or the last day of April, and I believe it was the first day of May.

129 Q. You were treated all right, were you, while you were there?

A. Yes sir.

Q. Who was your surgeon there?

A. The chief surgeon was Dr. Kale; that is the chief surgeon, and Dr. Woolsey was the house surgeon, the doctor in charge.

Q. Is Dr. Woolsey here now?

A. Yes sir.

Q. Now, Harry, what condition were you in when you got home, with reference to being able to walk?

A. I was scarcely able to walk at all; I was on crutches.

Q. How long did you have to use crutches?

A. Well, sir, I used crutches until about the middle of August, the best I remember.

Q. And since, you walk without crutches?

A. Yes sir.

Q. Do you have any assistance at all in walking?

A. Sometimes I can walk very well. Sometimes I walk without a cane, by limping. I force myself to do it, on account of Dr. Woolsey, the last thing he advised me to do, was to use this foot all I could.

Q. What condition have your feet been in when you were on or off of them, in reference to being free from pain?

A. When the weather is good, and I don't use them much, it is better, but they hurt me all the time when I walk.

Q. Have you ever been able, since then, to put your weight on your feet and walk without pain?

A. No sir, never have.

130 Q. What were you earning at this time?

A. I was making between three and five dollars a day; I have made a little better; of course it was extra occasions. I generally made about three and a half a day.

Q. What has been the shape of your kidneys since then?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and there is no contention made in the petition that there is anything the matter, except with his feet.

Mr. Cruce: I will withdraw the question now, until we see how the pleadings are.

Q. Have you had any trouble since you came home?

A. Yes sir.

Q. With your feet?

A. Yes sir.

Q. When was that?

A. It seems to me it was last August a year ago.

Q. What was that?

A. Well, sir, I had erysipelas in this foot here, and had fever from the effects of it; at least I was told so.
Q. Who was your doctor?
A. John A. Hailey, and I was mighty sick over it.
Q. Is Dr. Hailey here?
A. Yes sir.
Q. Was there anybody else there while you were sick this last time?
A. Yes sir.
Q. Any Doctors?
131 A. Yes sir.
Q. Whom?
A. Dr. Schular from Durant, a Frisco physicial, and Dr. Johns, from Hugo, a Frisco physician.
Q. They came to see you while you were sick with that suffering in your feet, or Erysipelas?
A. Yes sir.
Q. I wish you would take off your shoes and socks, so the jury can see your feet.
A. (Witness does as requested.)
Q. How is the railroad track there, with reference to being ballasted?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case.
Mr. Cruce: I will withdraw the question.

Q. I wish you would turn around. Have you washed your feet?
A. Yes sir.
Q. When?
A. Last night.
By the Jury: Which way did that car wheel run?
A. It hit me right there, went on down there and went on to there, and dropped off on this and went out to the end of it.

By Mr. Cruce:

Q. Is there any place about your foot there that has got any loose bones?
A. There is a bone right here that is either loose or gone. It puts a dent in my shoes there and hurts me all the time when I
132 walk there, it can be felt through.
By the Jury: How many bones were taken out of there?
A. The only way I know, the physician at Hugo says, I — taken my hand full of bones out of your foot.

By Mr. Cruce:

Q. Is there any of your foot in any way stiff?
A. This one is stiff. I have fairly good use of that one, the ankle there. There ain't any ankle in this one at all.
Q. What do you wear that white sock for?
A. To keep from getting that foot infected.
Q. Do that under the advice of a physician?
A. Yes sir.

Q. Well, now, are these the shoes you had on at that time?
A. Yes sir, they are.
Q. Is that the sock that was on your left foot that day?
A. Yes sir.

Mr. Cruce: We want to introduce this sock as exhibit B.
Mr. Klienschmidt: We object to that as immaterial.
The Court: Overruled.
To which action of the Court, the defendant then and there excepted.

Q. Did that sock have these cuts on the outside and inside before the injury?
A. No sir.

Mr. Cruce: Now we offer this sock.
The Court: Take your exception; let it go in.

Q. Are these the shoes you had on at that time?
133 A. Yes sir.
Q. Is that sock in the same condition that it was after it was cut off your foot after the injury?
A. Absolutely, yes sir.
Q. Are these shoes in the same condition they were when they were taken off your feet?
A. Yes sir.
Q. Did these shoes have the breaks and cuts that you see in them now before the injury?
A. No sir.
Q. And you had the shoes on at the time?
A. Yes sir.
Q. The left shoe was on the one that the sock was on?
A. Yes sir.
Q. Is this the show, exhibit D, that was on the right foot?
A. Yes sir.
Q. What is that dent on the sole there?
A. I suppose that is where the flange of the wheel hit it.

Mr. Klienschmidt: I object to any supposition.
Mr. Cruce: I will withdraw that answer.

Q. Was that shoe in the condition it is now before the accident?
A. No sir.
Q. Did it have these dents on the sole and heel?
A. No sir.

Mr. Cruce: Now, we ask to introduce these shoes as exhibits C and D.
Mr. Klienschmidt: We make the same objection as heretofore.
134 The Court: Take your exception.

Q. Are you able to do any kind of work now that requires you to staid on your feet?
A. No sir, I can't stand on my feet for very long at a time.

Q. Have you ever been since this injury?
A. No sir.
Q. Do you notice any difference in the feeling of your feet now from what it was before the injury?
A. Yes sir.
Q. What is it?
A. When I rub my hand across this foot here, the right one feels kind of normal, only it feels like it was puffed up, had air in it.
Q. Where was that?
A. Right there under the seam.
Q. What do you mean by that, the ankle or what?
A. It is below the ankle some two inches below.
Q. How about your left foot?
A. When I rub my hand across this left one here, it don't have any feeling; feels like there was a glove or sack or something on it.
Q. When you have pain in your feet, where is the pain?
A. Simply all over it.
Q. Over what?
A. The foot.
Q. Do you ever suffer any pain in your right foot?
A. Yes sir.
Q. Where is that?
A. In the middle toe; there is a nub there that comes out.
135 Q. You showed the jury under the right foot a hard place, where you said there was a bone gone or loose or something?
A. That is the place.
Q. Were those pains moderate or severe, or how?
A. They are very severe; hurt me all the time when I walk.

Cross-examination by Mr. Klienschmidt:

Q. You have gained twenty-five or thirty pounds since the accident, haven't you?
A. More than that.
Q. How much?
A. I suppose about forty pounds.
Q. You are living at Aylesworth, in Marshall County?
A. Yes sir.
Q. And you were living there before you applied for employment with the railroad company?
A. Yes sir.
Q. Who did you apply to for employment?
A. Fred Hohnsbeen.
Q. He was assistant superintendent at Hugo?
A. Yes sir.
Q. Did you go to him, or write him a letter?
A. I wrote him a letter, at the suggestion of a mutual friend of ours.
Q. I understand you wanted to learn the railroad work?
A. Yes sir.
136 Q. You made voluntary application for the employment?
A. Well, sir, in a way.

Q. That is, nobody forced you to do it?
A. No sir.
Q. You had observed trains running and being operated through your town, Aylesworth, haven't you?
A. Yes sir.
Q. And had some knowledge of the way trains were run from seeing them?
A. Yes sir.
Q. And you had some idea of what the duties of a brakeman were?
A. Yes sir.
Q. Working around trains and coupling and uncoupling cars, etc.?
A. Yes sir.
Q. And you wanted to work along the same line, you wanted to work as a brakeman?
A. Yes sir; start at that, at least.
Q. After you wrote to Mr. Hohnsbeen at Hugo, he sent you a contract to sign, didn't he, an application for employment?
A. Yes sir.
Q. Look at this paper, which I will have identified as defendant's exhibit 1, and ask you to state if that is the application that was sent you and which you signed?
A. Yes sir.
Q. That is your signature on the second page, is it?
A. Yes sir.

Q. And on the last page your signature appears in three
137 places, I believe. Is that correct?
A. Yes sir.

Q. Now, you signed this at Aylesworth, didn't you?
A. Yes sir.
Q. Prior to the time that this application was sent you, your father had gone to Hugo to urge your appointment, your application, hadn't he?
A. No sir.
Q. Hadn't he been to see Mr. Hohnsbeen at all?
A. If he had, I don't know of it.
Q. There were negotiations back and forth for a while before you were employed?
A. Yes sir, there was negotiations between Hohnsbeen and our friend, as I said awhile ago.
Q. This application here was sent to Aylesworth and you signed it there?
A. Yes sir.
Q. And then it was forwarded back to Hugo?
A. Yes sir.
Q. You were put to work about March or April, 1910, weren't you, as a student brakeman?
A. Yes sir.
Q. About what month, March or April?
A. It seems to me like it was in April.

Q. And for about twenty or thirty days you worked, learning the business?

A. No sir, it wasn't that long.

138 Q. How long was it?

A. It was some seven days, something like that, all told, that I was there.

Q. It was over a longer period of time than that, but that is the time you worked?

A. No sir, I only worked three trips.

Q. Seven days all together?

A. I don't know; it was seven days, the entire time I was in Hugo.

Q. Then, after that, you were examined?

A. Yes sir.

Q. On your qualifications as a brakeman?

A. Yes sir.

Q. That included your knowledge of the rules of the company, in reference to a brakeman, did it not?

A. Yes sir.

Q. And you say you passed an examination?

A. Suppose I did, I was put to work.

Q. You say you were examined on the rules. Are those rules that are included in this little book, which I will have identified as defendant's exhibit C? Is that the book of rules you were examined on?

A. Yes sir.

Q. I will refer you to the rules, commencing at number 630 and running down to 637, inclusive, and ask you to state if you familiarized yourself with those rules, and passed an examination on them?

A. Yes sir.

Q. And when your examination was accepted and you

139 were put to work as an extra brakeman, you were given a copy of this book of rules?

A. Yes sir.

Q. You understood, did you not, Mr. Brown, that you were to be bound by the rules of the company, that they were your guide as to your conduct in and about trains?

A. Yes sir.

Q. And in entering the employ, you agreed to obey them?

A. Yes sir.

Q. On the last page of this application that you signed appears the following, over your signature: I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, is dangerous, and is forbidden by the rules of the Company, and I agree to refrain from so doing. You signed that, did you not?

A. Yes sir.

Q. And understood that?

A. Yes sir.

Q. And that was in accordance with the rules of the company. Now, you also understood, did you not, Mr. Brown, as is stated in the

rules, that the occupation of brakeman was a hazardous or dangerous one?

A. Yes sir.

Q. And you knew that when you went into the employ of the company?

A. Yes sir.

Q. How long had you been working as brakeman at the time you had this accident, Mr. Brown?

A. It was about eight months.

140 Q. Where did you go to work as an extra brakeman?

A. It was sometime in July.

Q. 1910?

A. Yes sir.

Q. Then you worked continuously as brakeman up until February 20, 1911?

A. Yes sir.

Q. Now, did that include——

A. Do you mean that I worked continuously, that included no lay-offs or anything like that?

A. I mean that was your business, with the exception of a few days that you would take off occassionally?

A. Yes sir.

Q. Now, during that time, you worked on the run between Hugo and Hope and Ashdown, did you not?

A. Yes sir.

Q. And became familiar with the different stations along and their tracks and sidings?

A. To Ashdown?

The Court: Hope is the extreme eastern terminal?

Mr. Klienschmidt: Yes sir.

Q. Now, both Hope and Ashdown are in Arkansas?

A. Yes sir.

Q. This accident happened at Ashdown, in Arkansas?

A. Yes sir.

Q. At that time, you were working as brakeman on a local freight train that ran from Hope to Ashdown, and then back to Hope, weren't you?

141 A. Sometimes plied over to Ark India and into Oklahoma.

Q. I am asking you at this time?

A. Yes sir.

Q. That is, the crew would start the train out of Hope in the morning, run to Ashdown, do the station switching and then double back to Hope the same day?

A. They would go to Hope the same day, yes sir. The day before that, though, we went to Ark India.

Q. I am asking you about on this day?

A. Up until that time, we had got to Ashdown.

Q. Ark India is in the state of Arkansas?

A. Yes sir.

Q. Now, on the morning in question, February 20, 1911, your

train had come in from Hope, that is, from the east, and therefore when it got into Ashdown, was headed west?

A. Yes sir.

Q. Where did your train head in? Did it head *it* on the passin-track when you came into Ashdown?

A. To the best of my memory, we pulled in on the main line; I wouldn't swear that we did, but it serves me that we did.

Q. Then what did you do?

A. We got out. I was riding the caboose. It seems like Godbold was up on the cars, possibly. We started to the depot. He went in the depot. Do you want me to tell that over?

Q. No, I want to know what you did with your train.

A. Our train, with the exception of the cars we cut off, was still standing where we left it.

142 Q. Where did you leave it, on the main line or the passing track?

A. I am not sure which; the best of my knowledge it was on the main line.

Q. Will you say it was not on the passing track that you left your train?

A. I tell you the best of my knowledge.

Q. But you are not sure?

A. No sir.

Q. You said, in answer to a question asked by Mr. Cruce a moment ago, that brakeman Godbold, who was working with you, said you were going to do the switching for the Hugo crew. Do I understand you to mean by that that while the Hugo Crew was laying out, you were going to do their station switching there and make up their train that was to make up there and go west?

A. They weren't required to do any station switching.

Q. You were going to make up the train for the Hugo crew?

A. Yes sir.

Q. But you don't undertake to say that you knew where any car in that train was going?

A. I don't know the destination.

Q. There were other stations in the state of Arkansas between Ashdown and Hugo, weren't there?

A. Yes sir, two or three.

Q. And you don't know where any car or piece of freight that you were switching that morning went to?

—. —.

143 Q. Now, referring to this plat that you identified on direct examination, plaintiff's exhibit A, you refer to this stave mill track as a spur. Now, as a matter of fact, isn't that known as the M. P. & G. Connection, as it is labeled on this plat?

A. I suppose it is, but you know I wasn't familiar with the tracks at Ashdown, because that was the third or fourth time, I believe, to Ashdown.

Q. You had been over there before?

A. Yes sir.

Q. You know where the M. P. & G. Line is, don't you?

A. Yes sir.

Q. Just to get the names correctly, this curving track that went by the stave mill, if it connected with the M. P. & G. track, it would be the N. P. & G. connection?

A. Yes sir.

Q. And in any event, it wouldn't be proper to call it a spur track, if it connects with another line?

A. No sir.

Q. Now, as I understand it, so the jury will understand it also, this north track—this is north here?

A. Yes sir.

Q. This is west?

A. Yes sir.

Q. This is east and this is south?

A. Yes sir.

Q. Now, the north track, running east and west there, was known as the passing track?

144 A. Yes sir.

Q. The south track, running east and west, is the main line of the defendant?

A. Yes sir.

Q. These tracks over here——

The Court: You mean by the passing track is where the cars go on the siding. It is a track to enable a train going one way to pass another going another way?

Mr. Klienschmidt: Yes sir.

Q. Now, these tracks at the extreme west of this plat are the Kansas City Southern and have nothing to do with this case?

A. Yes sir.

Q. The track running across the center is the main line?

A. Yes sir.

Q. Now, I believe you stated that just before this accident, the engine of your train had backed in on this M. P. & G. connection, or stave mill track, to leave some cars there, spot some cars there, you say?

A. Yes sir.

Q. About how far up this stave mill track did you leave those cars?

A. Right at the mill, the further end of the mill. Of course, you understand there were several cars, I don't know how many, but they extended up almost to the crossing.

Q. About how far was it from the mill down to the switch where the stave mill track connected with the passing track?

A. You mean the west end?

Q. From the mill here?

145 A. You understand, the mill track extends longways around from the mill.

Q. From the place where you cut the cars off?

A. It is something like, I suppose, a hundred feet, may be further, and may not be so far.

Q. That is your best judgment?

A. Yes sir.

Q. Now, after you had spotted these cars and disconnected the cars that the engine had hold of, and those were spotted, the train pulled on out of the stave mill track, towards the passing track, the engine with several cars attached. How many cars were attached to the engine at that time?

A. I couldn't say definitely; there were some four or five.

Q. The engine, with four or five cars, started on then, out of the mill connection, towards the passing track. Did you ride the rear car out part of the way?

A. Yes sir, a very short way. I caught hold of the back iron and put my feet up on the bar there. About that time, he put some more to his engine, and got a little better start, and my feet was about to slip off, and I just stepped off, and it was just a short ways to the west end of the cars.

Q. How fast was the engine of those cars going as it moved away from the stave mill, after you got off?

A. I couldn't tell you, but they were going much faster than a man could walk.

Q. As they first started up, they were going slowly, weren't they?

146 A. Well, I went back to get the slack and when he started, he went out pretty fast, considering what you would call fast, pulling out of a switch.

Q. Three or four miles an hour?

A. I couldn't estimate it; it was faster than you could walk.

Q. You knew the next work to be done with those cars was to couple them up with the string that was standing on the passing track, didn't you?

A. Yes sir.

Q. Couldn't you, with perfect safety, have followed that string as they pulled out of the M. P. & G. connection, behind them as they moved in front of you, and opened the knuckle?

A. I started to do that, but in one place there was mud there, and by the time they got past the mud there, they were going faster than a man could walk, and they were on the frog then.

Q. You mean the frog sits in here?

A. Yes sir.

Q. How far from the switch?

A. I don't know; the length of the point.

Q. How far was that? About fifteen feet?

A. I don't know; it seems like it was more.

Q. Twenty feet?

A. Possibly so.

Q. And so you followed the cars down in twenty feet of the switch?

A. No sir, of the frog.

147 Q. I thought you said you followed the cars down to the point, and the frog was the length of the frog from the switch?

A. The best I remember it, I said I followed it almost to the frog; there would be four tracks there, four rails.

Q. You followed it down near to the switch, anyway?
A. No sir, near to the frog.
Q. And then you say you cut across to the passing track, to where the cars were standing still on the passing track?
A. Yes sir.
Q. Now, there is a street crossing running north and south between this switch and the cars that were stationery, is there?
A. It seems to me like that the cars that were stationery, the front car, the back end of it, was sitting over the crossing; it seems to me that way, but I don't remember.
Q. Are you positive?
A. No sir, I am not.
Q. Did you notice how far the first car on the stationery string on the passing track was from this switch here, from the switch stand?
A. No sir.
Q. What is your best judgment?
A. Well, sir, it was—I can't describe it to you, but you can estimate it; it was right near the clearance stob.
Q. That is a short post?
A. Yes sir, to indicate when two cars will pass each other
148 in the clear.
Q. Was it east or west of that stob?
A. It was east of it, if anything, because if it was west, it wouldn't be in the clear.
Q. Now, do you remember the car number of the stationery car on the passing track?
A. No sir, I don't; I couldn't tell you either of the numbers.
Q. Do you know what the make of the coupler was it was equipped with?
A. I declare I couldn't tell you. It could have been a high-tower coupler.
Q. Known as the tower coupler?
A. Yes sir, but I wouldn't say that this was one of them, because I don't remember.
Q. You say you went up to it and tried to operate it?
A. Yes sir, but you understood me when I said what length of time I was there.
Q. You mean you just went on to it momentarily, and went right away again?
A. No sir, I went up to it and taken hold of the lever and it wouldn't operate, and then I taken hold of the knuckle and I could only get it half way open, not enough to perfect the couple, and then I adjusted the drawbar, and then turned around and, like I told you, it started.
Q. That had a continuous lever, clear across the end of it, didn't it?
A. It seems to me like it did; I wouldn't be positive as to that.
149 Q. Well, now, in describing these parts of the coupler, you spoke of the pin lever, or a pin lifter. Now, to get this

clearly before the Court and the jury, there is, first, what is known as a lever, running from the side of the car up to the coupler?

A. Yes sir.

Q. That is a handle on the outside of it, to be raised?

A. Yes sir.

Q. That is called the lever?

A. Yes sir.

Q. Now, the pin lift is that part of the mechanism running from the lever to the pin, and like which, goes down into the coupler?

A. Yes sir.

Q. That is to be worked by the lever, and when lifted out of there, there is the knuckle of the coupler open?

A. It does sometimes; that is the intention of it.

Q. Now, just to identify these things, I will call your attention to this diagram, which I will have identified as defendant's exhibit 3. Do you recognize that as the drawing of one of the what is known as the Letrope coupler?

A. I couldn't swear as to the make of it, because I wasn't familiar with all of them, but I recognized it as being a draw-bar and coupler.

Q. Is that the kind of a coupler that the car, the last car on the string with the engine that pulled out of the mill track, was equipped with?

A. I couldn't tell you whether it was or not; it seems like
150 it was.

Q. Now, this is a side view, this center view here, is a side view?

A. Yes sir.

Q. The top cut here is looking down from the top?

A. Yes sir.

Q. The whole is known as the coupler?

A. Yes sir.

Q. The part right here, which is moveable, is known as the knuckle?

A. Yes sir.

Q. The part shown here, on the top picture, or here on the center picture, is the pin or the lock which, when moved by the lever, pulls up and opens the knuckle?

A. Supposed to, yes sir.

Q. You say, now, Mr. Brown, that you left these moving cars, being pulled by the engine out of the mill track, near to the frog?

A. I couldn't say as to what distance; it was somewhere where the four tracks were.

Q. Was close to the frog, I believe you said?

A. Yes sir, somewhere near to that.

Q. You left them there and went over to the stationery car on the passing track?

A. Not straight across.

Q. How did you go?

A. More backwards than forwards; had to to get to the car.
151 Q. That is, you turned around and went east?

A. Turned around like that, and went that way (Indicating).

Q. And you say you tried to work the lever on that car?
A. Yes sir.
Q. And you didn't think it was open far enough?
A. No sir.
Q. So you turned then, and went back to the moving string of cars?
A. Yes sir. When I turned, though, I signaled the engineer to stop.
Q. You were still on the north side of the track when you gave the signal?
A. Yes sir.
Q. And you say the cars, during that time, had only moved as far as the switch?
A. Said they were going about over the switch, yes sir.
Q. Those cars hadn't moved very far, then, while you were trying to work the other car?
A. They were slowing up.
Q. You didn't stay very long at that stationery car, did you?
A. No sir.
Q. Just went there for a moment?
A. Long enough to find out what I wanted to know.
Q. Then you say you went over and gave the engineer a stop signal?
A. Yes sir.
Q. And he obeyed that signal?
A. He practically stopped; he was slowing down and had almost stopped when he received the signal.
152 Q. How far did he run with that last car west of the switch target?
A. Somewhere between four and seven feet west of there.
Q. That is, the end of the last car in that string, the engine being headed west here, was four to seven feet west of that switch target?
A. Yes sir.
Q. Now, do you know whereabouts you were hurt on the track?
A. I judge I was hurt somewhere near the point.
Q. Did you take any note of it at that time?
A. I wasn't in any shape to.
Q. So you don't know where it was except from hearsay?
A. That is all, except the conclusions I drew in my own mind. I know the conclusions I had.
Q. Now, you say that after giving the engineer this stop signal, you threw the switch from the passing track, which lined up the passing track, to the engineer to move thos- cars across on the passing track, and then you gave him a spot sign?
A. Yes sir.
Q. How do you make that?
A. Like that (Indicating).
Q. Was it necessary or usual to give him another sign after you had given him a stop signal?
A. It sometimes insures greater impression. He is liable to take some other fellow's signals than yours.

Q. He was following your signals that morning, wasn't he?
153 A. He was supposed to.
Q. The other brakemen weren't anywhere around?
A. I couldn't say where Godbold was. When I left him he was on top, I believe, of a car, setting a brake.
Q. That is, on the cars that were left out of the connection?
A. Yes sir.
Q. You didn't see him follow these cars that were taken out of the connection at all; he didn't follow these?
A. No sir.
Q. So you were the only brakeman around there that you saw?
A. Yes sir.
Q. The conductor was up at the depot, was he not?
A. I couldn't tell.
Q. He wasn't anywhere around there?
A. I don't know.
Q. You say you gave him this spot signal and then immediately went in around behind the car?
A. Yes sir.
Q. What was the first thing you did after you went in?
A. Taken hold of the lifting pin on the south side of the car.
Q. Did you go across the track?
A. No sir; practically across.
Q. And you stood on the track and reached over for the lever like this?
A. I suppose you would call it reaching; I was partially on the south side of the track.
Q. Say this is the car. The lever extends out a few inches outside of the car, don't it?
A. No sir, I don't think so.
154 Q. It comes out to the side of the car?
A. All I ever saw *like* about two inches of going to the side of the car.
Q. The car projects out over the rail?
A. Yes sir.
Q. So the lever projects out beyond the rail?
A. Yes sir.
Q. So you go out to the South side of the track, and while still on the track, grasp the lever with the left hand?
A. Yes sir.
Q. And then grasp the knuckle with the right hand?
A. Yes sir.
Q. And while operating the lever with the left hand, you gave the knuckle a pull with the right hand?
A. Yes sir.
Q. And just then you heard the car coming?
A. Yes sir.
Q. And immediately then you started to get off the track?
A. Never did get to make a start, only in my mind.
Q. Point on this map, indicate as near as you can where you were when you heard that slack coming?
A. I couldn't point it out on the map there, because it isn't plain

anough, but I was somewhere between four and seven feet west of the switch.

Q. When you heard the slack coming?

A. Yes sir.

Q. And you say you had no opportunity to get off the track before the car struck you, throwing you down?

A. Yes sir.

155 Q. And you then tried to roll or throw yourself off of the track?

A. Yes sir.

Q. Now, as I understand you, the—Did you lay then on your left side or right side?

A. I was lying partially on my right side and back.

Q. More like this?

A. Like that (Indicating).

Q. And so then your left foot would be uppermost?

A. Caught first, yes sir.

Q. And the wheel, did it go through the bottom of the foot upwards or from the top of the heel down?

A. It didn't do either; it caught me on the leg, caught me right there.

Q. And it missed the ankle, did it not, the ankle bone?

A. There is the ankle, and the car wheel went right down, partially over the ankle.

Q. So that your foot was lying sideways like that?

A. That is the best I can tell you.

Q. Indicate there on that chair like your foot was lying?

A. I couldn't tell you positive, but I can give you something like it. My opinion is it was something on the order of that.

Q. In other words, you were almost clear of the rail when the cars came along?

A. Yes sir.

Q. Now, Mr. Brown, after this accident, the other trainmen, the other boys of the crew, picked you up and took you to the

156 caboose?

A. No sir, they brought the caboose to me.

Q. Brought the caboose to you and put you in it and got you to a doctor as quick as they could?

A. Yes sir.

Q. You were given a special train, an engine and a caboose made a special run with you all the way to Hugo?

A. By a conductor friend of mine asking them to.

Q. And Mr. Hohnsbeen, the assistant superintendent, told them to come on over?

A. No sir, I don't think he was there.

Q. Anyway the train went?

A. Yes sir.

Q. And you were taken to Hugo?

A. Yes sir.

Q. And then taken on the first through train to St. Louis, to the hospital?

A. Yes sir.

Q. You were taken to what is known as the Frisco Employes' Hospital, in St. Louis?
A. Yes sir.
Q. That is a modern hospital?
A. Yes sir.
Q. First class?
A. Yes sir.
Q. And you have no complaint to make of the treatment you got there?
A. No sir.
157 Q. You say Dr. Woolsey is here that treated you?
A. Yes sir.
Q. You say he did the best that could be done?
A. Yes sir.
Q. You think that he is a competent surgeon and gave you good treatment?
A. I know he is.
Q. You were kept up there in the hospital until about May 1st, I believe?
A. Yes sir.
Q. Then you went back home?
A. Yes sir.
Q. To Aylesworth?
A. Yes sir.
Q. Do you remember Mr. Baker, the agent who sits here coming to see you about the month of June?
A. Yes sir. He came twice; came in July and then in August, I guess.
Q. When he was there in June, and while your father was also present, you told him just in detail how the accident happened?
A. Yes sir.
Q. And at that time you made a written statement about how it happened?
A. Yes sir.
Q. Which you signed?
A. Yes sir.
Q. And that was done in the presence of and with the
158 knowledge of your father?
A. Yes sir.
Q. Who is an attorney?
A. Yes sir.
Q. Now, I will ask you if you made this statement at that time: After I made the cut on the M. P. & G. connection, I started and did ride out of the connection on the last car the engine had hold of, by riding on the brakebeam, with my hand on the grab iron. When I got beside the first car on the passing track, I started over to open the knuckle, so we could couple on, but didn't like the looks of the drawbar, I didn't think it would work and close the knuckle, and then followed the string out of the M. P. & G. connection. This string of cars was moving slow and no faster than a man could walk. I gave the engineer the stop signal, and the cars ran out over the switch some six or seven feet. I then set the switch for the passing

track and gave the engineer a signal to hold them. I walked east of the car, expecting the engineer would not move. I opened the knuckle with my right hand, when I heard the slack coming. I tried to get out on the left side of the track, and in getting away from the cars, I slipped and fell and rolled over twice in my effort to get away. I didn't get the draw-bar pin; in fact, didn't have time to work it, and don't know its condition. Did you make that statement at that time?

A. I made a part of that statement. As to the first part of it, I don't think I did.

159 Q. Then look at this document that I hand you. Is that your signature to each of these pages?

A. Yes sir, that is the one. The fellow came to me the morning after I had been operated on, or the morning before, I don't know which.

Q. This is the statement of June 20, 1911, by Mr. Baker, in the presence of Dr. Johns.

A. Yes, that is my signature.

Q. And that is Dr. Johns' signature, isn't it?

A. I couldn't tell you.

Q. Just look at that and see if that is the statement that was made at Aylesworth on June 20th? That is the one I just read you. I mean, is that the statement you signed at that time?

A. Yes sir, I suppose it is; it has got my signature.

Q. Now, I will read you the following statement from this statement that you say you signed on June 20th: When I got out beside the first car on the passing tract that stood east of the switch, I crossed over and started to open that knuckle, so we could couple on it, but I didn't like the looks of the draw-bar; I didn't think it would work and close the knuckle. Did you make that statement at that time?

A. It was something to that effect, yes sir.

Q. Now, I will ask you if you made this statement I will read to you also: I stood between the rails and went to lift the operating lever with my left hand, and open the knuckle with my right hand, when I heard the slack coming. I tried to get out on the

160 left side of the track. Did you make that statement?

A. I don't know whether it was exactly in those words or not. That is practically the statement I made to you awhile ago. I was partially on the south side of the track. There has been two years elapsed and as to the exact position, I will tell you the——

Q. "I didn't get the draw-bar open; in fact, didn't have time to work it, and don't know its conditions?"

A. Yes sir, that statement is true, if you will add to it that the lever was tried once.

Q. You state here you don't know its condition?

A. I don't think I ever said I didn't know its condition.

Q. You signed this at this time, and this has been over a year ago?

A. Yes sir, but I didn't write it.

Q. It was signed there in the presence of your father, was it not?

A. I don't know; I suppose he was there.
Q. Didn't he read it over?
A. I couldn't say.
Q. He was acting for you as your attorney at that time?
A. Yes sir.
Q. And legal adviser. Wasn't the statement read over to you after it was written out?

Mr. Cruce: We assume that it was.

A. It could be, or not; I don't remember.

(Witness excused.)

161 JOHN A. HAILEY, called as a witness on the part of the plaintiff, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. John A. Hailey.
Q. Where do you live?
A. Aylesworth.
Q. What is your business?
A. Practicing medecine.
Q. How long have you been practicing medecine?
A. A little over seven years.
Q. Are you a graduate of any school?
A. The Gate City Medical College. Before I attended that I was a student of the University of Texas.
Q. Do you occupy any position with the Marshall County Medical Board?
A. I am the secretary and treasurer of the Marshall County Medical Society, and have been for the last few years.
Q. Do you know Harry A. Brown?
A. Yes sir.
Q. Do you remember of his receiving an accident about the 20th of February, 1910?
A. Yes sir.
Q. Did you see him that day or night?
A. Yes sir, I saw him that night.
162 Q. Where?
A. At Hugo.
Q. What condition was he in, Doctor?
A. He was under an anesthetic then and in a condition of shock, incident to the injury.
Q. What kind was the shock, mild or severe?
A. It was severe.
Q. What time of night did you see him?
A. I suppose it must have been ten o'clock; I couldn't tell you the exact time.
Q. Had an operation been performed then or not?
A. Yes.

Q. Did you make any examination of his feet?
A. No sir, I didn't, just felt of one of his toes. His feet were tied up. I moved one of his toes that was tied up.
Q. Who was the attending physician?
A. Dr. Johns.
Q. Did you hear him say anything about whether or not he had removed any bones from the feet?

Mr. Klienschmidt: Objected to as irrelevant, incompetent and immaterial.
The Court: I think that is incompetent.

Q. When did you next see Harry Brown after that night?
A. I next saw him after he came back from the Hospital in St. Louis.
Q. Were you called to see him?
A. Yes.
Q. Have you seen him frequently or not since then?
163 A. Frequently.
Q. Well, Doctor, what condition—Did you examine his feet after he came back from the Hospital?
A. Yes sir.
Q. What condition did you find them in?
A. The right foot, the injury on the right foot had almost healed, but that on the left foot was still in pretty bad shape.
Q. Have you ever examined his feet to see whether or not there is any,—whether they are in their normal condition, or the bones are there or not?
A. His feet are in an abnormal condition, his left foot especially.
Q. What is the matter with it?
A. My opinion is that the bones have been crushed and some of them has been removed.
Q. What is the power of the foot, to move it at the ankle?
A. Passive motion can only be perfected in the left ankle joint and I think there is growing together of those bones.
Q. Is there any cure for that?
A. Why, I don't think so. In my opinion, there isn't.
Q. What is your opinion as a doctor as to whether there can be any operation performed that will restore the normal condition of the feet?
A. My opinion there is no operation known that can restore his left foot to a normal condition.
Q. Do you know of any operation that will restore his right foot to a normal condition?
A. I can't say.
164 Q. You don't know of any?
A. No sir.
Q. In the condition you found his feet, what would be your opinion as to walking on his feet or standing on them, would be free from pain or attended with pain?
A. I think there would be more or less pain attendant on the use of his feet.

Q. Were you called on to attend him some time in May or June after that?

A. In June, yes sir.

Q. What was his condition then?

A. I found him suffering with a violent attack of erysipelas.

Q. Where?

A. In the left foot and leg.

Q. What was the cause of that?

A. The origin of it was due to local infection of the wound by the erysipelas germ.

Q. Infection of the wound, you mean by that, poisoning?

A. Yes sir.

Q. Was that spell of sickness, was it serious or just ordinary or what?

A. I considered it very serious, very much so.

Q. Was his foot swollen or free from swelling?

A. There was some swelling there, yes sir, and a good deal of illness and a good deal of pain. His constitutional symptoms were highly magnified, considerable prostration.

Q. How much, do you remember?

A. Ranged 104 and 104½ or 5, and I think it ran a little
165 over 105; I couldn't say just exactly.

Q. Have you recently examined his feet?

A. Yes sir.

Q. What condition is the tissue in with reference to having resisting power to infection that may happen hereafter?

A. The vitality of the tissues, there *in* considerable reduction in the form, I want to say, in the vitality of the tissues; that is, they may resist infection as well now as they once could have if this injury had not been received. Here is the statement: the power of vital resistance has been reduced.

Q. Well, now, do I understand you that if he were to receive an abrasion of the skin on one of these feet, that he would be more liable to blood poison than he was before?

A. He would to Erysipelas; he wouldn't to blood poison.

Q. An infection of Erysipelas, is that dangerous?

A. At times, it is.

Cross-examination by Mr. Klienschmidt:

Q. Doctor, you say it was the left foot that was effected with Erysipelas?

A. Yes sir.

Q. Now, that hadn't entirely healed at that time, had it?

A. No, not entirely.

Q. There was sup-eration there?

A. Yes sir.

Q. That means that matter was still present?

166 A. Yes sir.

Q. Now, an open wound like that is peculiarly subject to infection?

A. Yes sir.

Q. And that was the reason that Erysipelas took hold in that foot, is because it was open?

A. Yes sir.

Q. Now, since that time, the wound has entirely closed up?

A. Yes sir, the wound has healed.

(Q. And in its present condition it is no more subject to Erysipelas than a man's right hand?

A. Of course, I will have to answer that like this, *this* that surface there, the continuity of tissue, is much more easily broken than it would have been if it had never happened. I think it is more apt to, yes sir.

Q. I say, without an abrasion, without an opening, it is not subject to Erysipelas?

A. I think it is.

Q. There has to be a scratch or breaking of the skin for there to be an infection?

A. Well, I said this, I mean this, that if was more subject to infection than it was if it had never been injured by the scratch.)

Q. But there wouldn't be any danger without an abrasion? What I am getting at is, I want to know whether it is necessary that there must be an abrasion or opening before an infection will take place?

167 A. The latest writers on that subject say, however, that we have these conditions of Erysipelas where we can't find an abrasion.

Q. The authorities say that?

A. Yes sir.

Q. And at the present time, there is no opening?

A. No sir, none that we can see.

Q. Now, it has been more than a year since that Erysipelas took place, hasn't it?

A. Yes sir.

(Witness excused.)

HARRY A. BROWN, recalled by the defendant for further cross-examination, testified as follows:

By Mr. Klienschmidt:

Q. Mr. Brown, you have no objection, have you, to Dr. Woolsey examining your feet?

A. None whatever.

Q. Now, since your return from the hospital at St. Louis, you have been living at home, there at Aylesworth?

A. Yes sir.

Q. You followed a business since that time, have you not?

A. A part of the time, yes sir.

Q. You are now engaged in the weighing business, are you not?

A. Yes sir.

Q. And are able to attend to that business?

A. Yes sir.

168 Q. Previous to being engaged in the weighing business, you were running a store at Aylesworth, were you not, a general merchandise store?

A Yes sir.

Q. Now, I notice that you are using a cane now, and I believe you have been since you came to this trial. I believe you stated on direct examination that a part of the time, at home, you didn't use a cane?

A. Yes sir.

Q. And part of the time you did?

A. Yes sir.

Q. That is, you are able to walk around without crutches or a cane?

A. When they feel in a certain way, as I told you while ago. When the weather is clear, they feel much better sometimes than they do at others.

Redirect examination.

By A. C. Cruce:

Q. Now, Ha[illegible] you say you went in some kind of business after you recovered, and got so you could walk about?

A. Yes sir.

Q. Where was that?

A. Aylesworth.

Q. When did you go into business?

A. About July.

Q. 1911?

A. Yes sir.

169 Q. How long were you in business? What business was it?

A. General mercantile business.

Q. How long were you in that business?

A. A little over a year.

Q. Well, did you make a success or a failure of that business?

Mr. Klienschmidt: That is objected to as immaterial.

Q. Did you make a success or failure of that business?

Mr. Klienschmidt: That is objected to.

Q. Are you capable of making a success in the mercantile business, or character of business you were in?

A. It don't seem like I am.

Q. Did you make a success?

Mr. Klienschmidt: That is objected to as calling for a conclusion.

The Court: Sustained.

To which action of the Court, the plaintiff then and there excepted.

Q. When was this statement made at Aylesworth? June 20th?

A. I don't know about that statement there. The time my signature was put there, the day I was sick in bed there at Aylesworth, sometime in June.

Q. Was that at the time you had this spell of Erysipelas that the doctor testified to?

A. Yes sir. Mr. Baker and Dr. Johns and Dr. Shular came over there.

Q. Who is Mr. Baker?

A. He is claim agent of the Frisco.

Q. And Dr. Johns was there?

170 A. Yes sir.

Q. He was the man that operated on you at Hugo?

A. Yes sir.

Q. Who else was there?

A. Dr. Shular at Durant.

Q. Who is he?

A. He is Company physician at Durant, I understand.

Q. Who else was with him?

A. Mr. Pollard.

Q. Who is he?

A. He is another claim agent.

Q. What did he say to you to get you to make this statement?

A. I couldn't tell you; he talked with my father.

Q. At any rate, you understood they wanted a statement?

A. Yes sir.

Q. And you gave them a statement?

A. Yes sir.

Q. Who wrote that statement?

A. Mr. Baker.

Q. And you signed it?

A. Yes sir.

Q. Now, I notice in this statement,—I didn't get the drawbar open. In fact, didn't have time to work it and don't know its condition. Did you have time to find out its condition?

A. I had time to find out by knowing it wouldn't work automatically.

Q. Did you ever have an opportunity since to examine that car and knuckle?

171 A. No sir.

Q. This statement also contains this: I was opening the knuckle in the usual and customary way I knew the knuckles were supposed to open. Were you trying to open that knuckle in the usual and customary way?

Mr. Klienschmidt: That is objected to as calling for a conclusion of the witness.

The Court: You can't lead him, but it is a matter that you can call his attention to.

Q. What is the truth, as to whether you were trying to open that knuckle in the usual and customary way?

A. Yes sir.

Q. This statement contains this: I know the knuckles are supposed to open by raising the operating lever, but they don't do it. You have to put your hand on the knuckle to open it. Now, suppose that

you came to the lever, one of these automatic knuckles, and you took hold of the lever and it wouldn't open the knuckle. What is the usual custom among the employes and brakemen of that road as to how they got the knuckle open?

Mr. Klienschmidt: That is objected to as irrelevant, incompetent and immaterial, and not tending to prove or disprove any issue in this case. They haven't alleged any custom.

The Court: I understand you have been over that statement and he is seeking to cross examine him on other statements in there.

Mr. Cruce: The facts show that the statement was drawn up by your claim agent. I think it is germane to the matter.

The Court: I will let him inquire about it, if it is in the
172 statement.

To which action of the Court, the defendant then and there excepted.

Q. You say in this statement that "I know the knuckles are supposed to open by raising the operating lever, but they don't work, and if they don't do it, you have to put your hand on the knuckle to open it. What is the usual and customary way? If you go to raise the knuckle with the lever and it doesn't raise it, how do you get the knuckle open?

Mr. Klienschmidt: Objected to as not being in the issues of the case, and incompetent, irrelevant and immaterial. The custom is not for the custom as to other knuc-les, but this particular knuckle.

The Court: I think the proof should be whether it was necessary to be done and not what the custom was, and let the jury pass on the necessity of doing it that way; not what the custom was.

Mr. Klienschmidt: The rules prescribed his duties.

Q. I understand you to say then, you went and tried to open that knuckle with the lever and it wouldn't do it?

A. Yes sir.

Q. What was it your duty then to do?

A. It had to be opened if there was a coupling made.

Q. How did you open it?

A. I couldn't do it without putting my hands on it.

Q. Did your duties require you, when the lever wouldn't work it, to go off and quit the train?

Mr. Klienschmidt: Objected to as argumentative and leading.

173 The Court: That is objectionable.

Q. Now, Mr. Brown, what was the condition—How long had you been sick when you made this statement at Aylesworth, with this Erysipelas, before these four railroad men got there to make this statement?

Mr. Klienschmidt: I object to that as assuming a statement of facts not shown.

The Court: Before these four men got there is objectionable.

Q. How long had you been ill before they were there?

A. I taken ill one day about eleven o'clock, and the next day, it seems to me like at about three, they were there, the best of my knowledge.

Q. What was your condition? Were you sick or well or suffering or how?

A. I wrote them I was mighty sick; I felt like it.

Q. Do you know how they found out that you had had that attack?

A. No sir.

Q. Don't know what brought them there?

A. No sir.

Q. Had you already, prior to that, given the railroad a statement?

A. Two of them.

Q. When had you given them the first statement?

A. Well sir, it was either one or two days after I got to the hospital, and I couldn't tell you which.

Q. Hospital in St. Louis?

A. Yes sir.

Q. Who was it?

174 A. Some little block-head.

Q. Who was he?

A. I don't k[illegible]

Q. Who was he working for?

A. He said he was working for the railroad.

Q. Was it a written statement or what?

A. It was a written statement; that is, I gave it to him and he wrote it down.

Q. Now, subsequent to that, did you give a statement before this statement at Aylesworth?

A. Yes sir.

Q. Was this the second statement that Mr. Baker got?

A. Yes sir.

Q. Where were you when you gave Mr. Baker the first statement?

A. In Aylesworth.

Q. How long after this first statement was it that you gave Baker the last statement?

A. It seems to me like I gave Mr. Baker the first statement on the 2nd day of June.

Q. And then this statement was about?

A. The 20th, it seems like.

Q. Nor, Mr. Klienschmidt asked you about being able to walk without your stick. You say that at times, in cloudy weather, your feet hurt you worse?

A. Yes sir.

Q. Whenever you can walk without a stick, you do it?

A. Yes sir.

Q. But it is always painful?

175 A. Yes sir.

Q. When you went to Hugo to have your operation performed, Dr. Johns saw it?

A. Yes sir.

Q. After he looked at your foot and examined it, what did he say about the necessity of amputating it?

Mr. Klienschmidt: Objected to as incompetent, irrelevant and immaterial.

The Court: He can state the condition of the feet.

Q. What did the doctor say at that time about the injury to your foot and how serious it was?

Mr. Klienschmidt: Same objection.

The Court: I will let him answer that.

To which action of the Court, the defendant then and there excepted.

A. He told me that I would lose my left foot and a portion of my right foot.

Q. What did you say to him?

Mr. Klienschmidt: Now, what is the materiality of that? I move that it be stri-ken out.

Mr. Cruce: It shows how serious it was. I apprehend that our friends will take the position that this man isn't hurt much, because he can walk without a stick.

The Court: He can testify about the severity of the injury as much as he pleases and what the doctor told him about the seriousness of it, but what the doctor said about his losing his foot, I don't think that is relevant or necessary.

176 Q. What did the doctor say about the injury to your foot?

Mr. Klienschmidt: That is objected to.

The Court: If it is going to what he said about losing his foot, it is sustained.

To which action of the Court, the plaintiff then and there excepted.

Q. What else occurred between you and the doctor there?

A. There wasn't much conversation on my part of it. When he made the examination, he told me, and everybody seemed to be talking about how bad it was, and I told him not to cut either one of them off, that I wouldn't give my consent to it at all, and he said it would be essential to cut this left one off, and that he didn't see how it could be saved.

Mr. Klienschmidt: We move to strike the answer out, as incompetent, irrelevant and immaterial, and not responsive to the question.

The Court: That part of the answer is immaterial.

To which action of the court, the plaintiff then and there excepted.

Q. These cars that you were coupling up and putting into that train, what kind of cars were they?

A. The car that I got crippled on was an empty stock car.

Q. I mean the other cars. Were they such cars as were usually used on that right of way, to be sent from one state to another?

Mr. Klienschmidt: That is objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

177 Q. Were those cars used in shipping freight by the defendant railroad, interchangeably between Arkansas and Oklahoma?

Mr. Klienschmidt: That is objected to for the reason that the witness has not shown that he is qualified to answer, and for the second reason, it calls for a conclusion. We make this concession: we concede that the railway is a highway of interstate commerce, and was being operated between Hope and Ashdown.

The Court: Overruled.

To which action of the Court, the defendant then and there excepted.

A. Yes sir.

Recross-examination by Mr. Klienschmidt:

Q. Didn't you tell me when I asked you before if you knew where any of those cars were going and you said not?

A. These special cars, I never saw the way-bills, but I never saw anything keeping the cars in Oklahoma or Arkansas.

Q. I asked you where these cars were destined to at that time?

A. I don't know where they were going at that time.

Q. With reference to this statement that was made at Aylesworth, and which you say both Dr. Johns and Dr. Shular were present, I will ask you to state if these doctors weren't both present by invitation of your father?

A. I don't think so.

Q. Do you know about that?

A. No sir.

Q. They were treating you, were they not?

A. Well, no, sir, they hadn't been previous to that.

178 Q. They came there for that purpose, to treat you, didn't they?

A. Yes sir, I suppose they did.

Q. Now, you were asked about Mr. Pollard——

Mr. Cruce: We object to him supposing.

The Court: It isn't material one way or the other.

Q. Being present, I will ask you to state if Mr. Pollard isn't the mutual friend that you referred to, that helped get your position?

A. Yes sir.

Q. He is a friend of yours?

A. Yes sir.

Q. And you considered him as such?

A. Yes sir.

Q. Now, when this statement was made in the presence of these doctors, wasn't your father present?

A. Yes sir, my father was present a portion of the time, and possibly all the time. It seems to me like he and Mr. Baker were the only ones in the room, the best I remember.

By Mr. Cruce:

Q. Harry, look there. Your name is signed in your hand-writing on the first leaf of that, isn't it?
A. Yes sir.
Q. And then signed against on the second sheet?
A. Yes sir.
Q. Then it is signed again over here and third time?
A. Yes sir.

(Witness excused.)

179 JOHN A. HAILEY, re-called as a witness on the part of the plaintiff testified as follows:

Direct examination by A. C. Cruce:

Q. Doctor, please state whether or not it is a fact that Dr. Johns and Dr. Shular came to Aylesworth at this time in June at your request?
A. Mr. Harry Brown, he was so sick we didn't know whether he was going to get well or not, and I told Mr. Brown the gravity of the case, and I told him it might be best, inasmuch as Dr. Johns had treated him, to come up to see him.

(Witness excused.)

And thereupon, the usual hour for the noon recess having arrived, Court was adjourned to one o'clock P. M. of said day.

And afterwards, to-wit, at one o'clock, the hearing of this cause was resumed, and the appearances were the same as in the morning, and the following proceedings were had, and the following evidence was introduced, in the order following, to-wit:

Agreement of Counsel.

It is agreed that this table from which we read is the duly authorized American table of mortality of insured lives.
The Court: Longevity.
Mr. Cruce: Yes sir. We offer the table, showing that the life expectancy of a party 22 years old is 42.2.
180 Mr. Klienschmidt: We object to that in this case, because it is incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case, and we think it should be offered by an expert, who can be cross examined, to show whether or not that would apply to persons who are engaged in hazardous business.
The Court: I will let it go in for what it is worth.
To which action of the Court, the defendant then and there excepted.

And here the plaintiff rested his case.

Whereupon, Counsel for defendant filed in open Court its demurrer to the evidence of plaintiff, which demurrer appears in the words and figures following, to-wit:

181 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Demurrer to the Evidence.

Comes now said defendant and demurs to the evidence of the plaintiff, for the reason that the same does not establish facts sufficient to entitle said plaintiff to recover.

R. A. KLIENSCHMIDT,
J. H. GRANT,
Attorneys for Defendant.

On the back of said demurrer appears the following endorsement: Filed in open Court Dec. 10, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

182 And the court, after hearing said demurrer and being sufficiently advised in the premises, overruled the same.
To which action of the Court, the defendant then and there excepted.

Whereupon, the defendant offered and introduced evidence in its behalf as follows, in the order following, to-wit:

Defendant's Evidence.

R. A. WOOLSEY, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name and residence, please?
A. R. A. Woolsey, St. Louis.
Q. What is your occupation?
A. Physician and surgeon.
Q. How long have you been following that profession, doctor?
A. Nearly nine years.
Q. Of what school are you a graduate?
A. St. Louis University.

Q. What is your present position, if any?
A. In charge of the St. Louis hospital of the Frisco employes.
Q. Is that the hospital referred to by the plaintiff as being the one in which he was treated in February of last year?
183 A. Yes.
Q. State whether that hospital is operated by the St. Louis & San Francisco Railroad Company or not?
A. It is not.
Q. By whom is it maintained?
A. By the employes.

Mr. Cruce: We object if the court please.
The Court: I will let it stand.

Q. Is that a separate organization from the Company?
A. Yes sir.
Q. State whether the surgeons in that hospital are employed by the employes' association or not?
A. Yes sir.
Q. They are. Are you acquainted with the plaintiff in this case?
A. Yes sir.
Q. When did you first meet him, Doctor?
A. On his admission to the hospital at the time of his injury, February 21st.
Q. Did you have charge of the treatment that was accorded to Mr. Brown in the hospital?
A. Yes sir.
Q. Just state briefly what that was, Doctor?
A. In these cases, we have to deal with infections usually, and the morning after his admission to the hospital, he was taken to the ex-ray room, where pictures were taken, and shortly after that, about 11 o'clock that forenoon, he was taken to the operating room, where he was given an anesthetic for the purpose of thorough dress-
184 ing, thorough packing, etc. The dressing was considered too severe, the first dressing, as we wished to pack it for proper drainage, was too severe, too painful without an anesthetic.
Q. Does the anesthetic render it painless?
A. Yes sir.
Q. Was the operation performed at that time?
A. Merely the removal of a small portion of the seam bone, just in front and below what was called the ankle bone.
Q. Did you have ex-ray photographs made at that time showing the condition of the feet?
A. Yes sir.
Q. Will you produce those, please?
A. (Witness does as requested.)
Q. Now, which foot does this photograph show (handing photograph to witness)?
A. That is the left foot.
Q. Will you show on there, please, the bone that you refer to?
—. ——.

The photograph referred to was here identified as defendant's exhibit 5.

Q. That is the ex-ray photograph of the left foot?
A. Yes sir.
Q. Taken before the dressing?
A. Yes sir.
Q. Just show the jury where the bone is that you spoke of as having removed?
A. This picture is taken, a lateral view, from this way. This is the little bone that was removed.
Q. That is the only bone that was removed from that foot in St. Louis?
185 A. Yes sir.
By the Jury: How large was that bone, Doctor?
A. About that size (indicating).

By Mr. Klienschmidt:

Q. You indicated to the jury the size of the bone as removed, state in measurement.
A. It is an irregular shaped bone, about ¾ of an inch through.
Q. Was it necessary to remove that bone?
A. Yes sir.
Q. I don't think I asked you before how much experience had you had in surgery at this time?
A. I have been associated in surgical work seven years, at that time.
Q. And have you had occasion, or not, during that time, to perform operations of similar character, Doctor, ligaments that were mashed, or cut, or bruised, etc.?
A. A great many.
Q. What other treatment was given this foot, now, besides that?
A. We packed the wounds with gauze, to facilitate drainage.
Q. Did you hear the testimony this morning, in which the plaintiff said that one of the doctors at Hugo informed him that he had taken out a hand full of bones from this foot?
A. Yes sir.
Q. I will ask you to state from your examination of this
186 foot, whether that statement was true or not.

Mr. Cruce: We object, if the court please, as irrelevant, incompetent and immaterial.

Q. State whether or not a hand full of bones had been taken out?
A. The only bone in the foot that had been cut loose of any part was this bone I indicated, and you see there just a little over half of it. I took the rest of it out.
Q. How long was the portion that was taken out previously, the length of it?
A. I took out about half of it. It was evidently in several pieces from the shape of the wound at that time. It had evidently ground up, that portion that had already been taken out, and it would have been a very little less than the part I indicated.

Q. In other words, the part that had been taken out, previous to your examination would be less than ¾ of an inch in diameter?
A. Yes sir.

Q. I will ask the reporter to identify this photograph. The photograph referred to was identified as defendant's exhibit 6.

Q. What is the photograph I hand you, identified as defendant's exhibit 6?
A. That is a picture of the right foot.
Q. Looking down at it?
A. Yes sir.
Q. When was that taken?
A. At the same time.
187 Q. Is that an ex-ray photograph?
A. It is not a photograph; it is a shadowgraph.
Q. That shows the bones?
A. Yes sir.
Q. Just state what treatment you gave this foot, doctor?
A. It was given practically the same treatment the other foot was given; no bones removed.
Q. No bones at all removed?
A. No sir.
Q. Was it necessary to remove any bones?
A. No sir.
Q. Now, just go ahead and state briefly what treatment was given plaintiff from this time on up to the time he was discharged from the hospital?
A. The wounds were dressed from time to time, and drained thoroughly to get rid of the infection that was already there, and that constituted the treatment.
Q. When was he discharged from the hospital, do you remember?
A. I do not; I have the records.
Q. Just refresh your recollection if you can, from the record?
A. May 1st.
Q. Can you state, Doctor, what is the character of the facilities offered by this hospital in St. Louis, as compared to others there?
A. As good as any in the city; as good as any anywhere. We have everything we can use.
Q. Equipped with all modern inventions?
A. Yes sir.
Q. State whether or not this plaintiff was given the most approved and scientific treatment with his feet?
188 A. He was.
Q. To save them in the best possible way?
A. He was.
Q. Now, in testifying this morning, plaintiff stated, on his right foot there was a hardness or pufliness on the bottom of the foot. Can you state from your examination that you made since coming here what is the cause of that?
A. Yes sir. The injury, there were three of the lesser bones back of the lesser toes, and that was such a minor injury as compared to

the rest of the foot that it wasn't given any attention, because the rest of the injury needed removal of the dressing every day, and in order to get a good result in a fracture, you have to leave the dressing on for quite a time. That fracture has been overlapping a little bit, causing a large callous, and can easily be removed.

Q. You say that that condition can be remedied by a slight operation?

A. Yes sir.

Q. And remove all complaint from that feature of the foot?

A. Yes sir.

Q. Would that operation on the foot—State what effect, if any, that would have upon Mr. Brown's ability to use that foot, the right foot?

A. The operation you have just mentioned?

Q. Yes.

A. It would make it—absolutely relieve him of any trouble in that foot.

Q. That is, you mean he could walk on the foot without inconvenience?

189 A. Yes sir.

Q. Would that condition compare favorably with the condition of the foot before it was hurt, after this operation was performed?

A. Yes sir.

Q. Now, you heard the testimony this morning, doctor, did you not, about the erysipelas in the plaintiff's left foot?

A. Yes sir.

Q. That is a disease that is communicated by infection, is it not?

A. Yes sir.

Q. That is, by a germ being allowed to enter a wound or open place?

A. Yes sir.

Q. This foot has healed up, has it not?

A. Yes sir.

Q. And there is no place there for infection to enter?

A. No sir.

Q. Any more than there is on a man's hand or arm?

A. No sir.

Q. Is there any reason to anticipate that Erysipelas would recur in this foot or either one of them?

A. No sir.

Q. Any other part of the body that would be scratched would be subject to Erysipelas the same as the foot, would it not?

A. Yes sir.

Q. Now, Doctor, did Mr. Brown say anything to you about how he received this injury?

A. He made a report to me, yes sir.

Q. What did he say about how it happened?

190 A. I would rather read from the report that is here. In answer to question 14 in our report (Reading from the report); what does injured person say was the cause of his injury?

Answer. (While trying to open the knuckle on the last car on the end attached to engine. The engineer started to back the train without a signal from myself. I then started to get off the track, but slipped, as everything was wet and slippery. I tried to throw myself off the rail, and was about off when my right shoe caught in the switch point. By that time the first truck had run over both my feet, and I then broke loose and rolled off the track.)

Q. He made that in conversation with you, did he?

A. Yes sir.

Q. I will ask you to state whether, by stating he slipped—in stating he slipped, he said that that was the cause of his falling?

Mr. Cruce: We object.

The Court: Sustained.

To which action of the Court, the defendant then and there excepted.

Cross-examination by A. C. Cruce:

Q. Will you read from the heading of that card upon which that report is made?

A. St. Louis and San Francisco Railroad Company. Surgeon's report.

Q. Where did you get that card upon which to make that report?

191 A. I don't quite understand.

Q. I say, does the railroad furnish you with those blanks upon which to make your report?

A. Yes sir.

Q. Now, who is Dr. G. W. Kale?

A. Chief surgeon of the Frisco.

Q. He is located at Springfield?

A. St. Louis; that is an old sheet.

Q. This report was made to him?

A. Yes sir.

Q. Now, one of these questions that you are asked to report on in this was this: Will any permanent injury or deformity result, and if so, what, and you answered yes?

A. Yes.

Q. Now, you said this hospital was supported by the employes of the railroad?

A. Yes sir.

Q. That is, each employe of the railroad is taxed so much monthly and so much monthly is deducted from his wages to support that institution?

A. Yes sir.

Q. Deducted by whom? The Frisco Railway?

A. Yes sir.

Q. How many photographs did you take there, doctor?

A. These two.

Q. No others?

A. No sir.

Q. Now, this left foot, just show to me from where you took the photograph on your foot?

192 A. The photograph was taken in that manner, with the plate under the foot; from directly above.

Q. What do you mean by the plate under there?

A. The ex-ray plate that that was a print from.

Q. It was under?

A. Yes sir.

Q. And what was this that was above?

A. The ex-ray tube.

Q. That doesn't show all the left foot, does it, Doctor?

A. No sir.

Q. In this photograph, it doesn't show the toes?

A. No sir.

Q. Or any of the bones connected out there?

A. Yes, it shows the bones in the foot, in the arch of the foot.

Q. It shows the bones in the arch of the foot and the bones in front of that, it doesn't show?

A. No sir, there was no injury there.

Q. You could have taken a photograph there and shown the toes of that foot?

A. Yes sir.

Q. But you didn't do it?

A. No sir; there was no injury.

Q. You say there was no injury on that left foot in front of the ankle bones or the instep bones?

A. In front of these bones showing?

Q. You say these are the instep bones?

A. Yes sir.

Q. Now, what did you do with these photographs when you took them?

193 A. Put them in the files.

Q. That who keeps?

A. The hospital.

Q. When did you submit them to the attorneys of the railroad or to the agents of the railroad?

A. I think today is the first time any of the railroad has ever seen them.

Q. Had any of the claim agents ever seen them?

A. No sir.

Q. Had they written you about them?

A. No sir. I wasn't requested to bring these along.

Q. Had you been in correspondence with the attorneys for the railroad?

A. Yes sir.

Mr. Klienschmidt: If the Court please, I don't think it is proper for counsel to take Dr. Woolsey's file here, or his correspondence and examine him about it.

The Court: Do you object to counsel examining him?

Mr. Klienschmidt: Yes, about his correspondence. It is immaterial, and can't go to prove any issue in this case whatever.

The Court: So far as I understand, the objection is well taken.

Q. How did you come in possession of that letter of November 20, 1912, from H. B. Spaulding, claim attorney, to G. W. Kale, chief surgeon?

A. It was turned over to me when I came down here.

Q. By whom?

A. Dr. Kale's chief clerk.

Q. Who is H. B. Spaulding?

194 A. General claims attorney for the Frisco; W. B. Spaulding.

Q. This letter states——

Mr. Klienschmidt: If the Court please, we object.

The Court: Sustained.

Q. I will ask you this, that if this plaintiff, at the time you took charge of him there, had not received the skillful treatment that he did receive, that he probably would have lost both his feet?

A. No sir. He could easily have lost the left foot, but no reason for losing the right foot.

Q. There was reason for apprehending the loss of the left foot?

A. Yes sir.

Q. That was a serious injury?

A. Yes sir.

Q. And a permanent injury?

A. To the left foot, yes sir.

Q. What operation is it that could be performed on the right foot to make it as good as the other?

A. An incision made on the ball of the foot, and that part of the callous that has been thrown down there and makes that place on the bottom of his foot, that could be removed and relieved.

Q. It would be necessary to remove the bone?

A. No sir, just the callous.

Q. It is painful to use that foot now?

A. Yes sir.

Q. And it never will be relieved, he never will be relieved

195 of that pain and trouble until he is operated on?

A. It isn't likely.

Q. The tissues of this foot are not as strong as they were before the injury, are they?

A. The tissues themselves are.

Q. Well, what is it that is not as strong?

A. There is not as much tissue there as there was.

Q. That foot would be more easily infected when an abrasion occurred, would be more easily effect- than if it had never been injured?

A. Not at all.

Q. That foot can resist blood poison or disease or injury just as well now as it ever could?

A. Yes sir.

Q. Did you get a report from Dr. Johns as to the operation that he performed on the foot?
A. He made no report.

(Witness excused.)

F. D. HOHNSBEEN, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury?
A. F. D. Hohnsbeen.
Q. Where do you live?
A. At Smithfield, Texas.
Q. What is your occupation at this time?
196 A. I am train master for the M., K. & T.
Q. At Smithfield, Texas?
A. Yes sir.
Q. How long have you been engaged in the railway business?
A. About twenty-five years.
Q. What position did you start in?
A. I started in as a porter.
Q. What positions have you occupied in the last twenty-five years?
A. Practically everything in the station, train and engine service except running an engine or fireman.
Q. Have you been engaged in the operation of trains?
A. Yes sir.
Q. Conductor or brakeman?
A. Yes sir.
Q. Freight trains?
A. Yes sir.
Q. What was your position in the month of February, 1911?
A. Train master for the Frisco.
Q. At Hugo, Oklahoma?
A. Yes sir.
Q. As such, did you have charge of what is known as the A. & C. Line?
A. Yes sir.
Q. Between Ardmore and Hope?
A. Yes sir.
Q. Are you acquainted with the plaintiff, H. A. Brown?
A. Yes sir.
197 Q. When did you first become acquainted with him?
A. It was shortly after I went to Hugo. I went to Hugo in 1909, in the fall, and it was sometime in the Spring, I believe, of 1910.
Q. How did you get acquainted with him? What was the occasion of it?
A. I don't recall where I first met him, but several people saw me in his behalf to get him on as a student brakeman. I believe his father was over to see me once and talked it over with me, and several other people.

Q. You say his father was there to see you about him?
A. Yes sir.
Q. Did you furnish him an application to sign for employment?
A. I sent one to him through the agent at Aylesworth.
Q. Was that returned to you signed up?
A. Yes sir.
Q. Is Defendant's Exhibit 1 that application that you sent him and that was returned, signed up at that time?
A. Yes sir.
Q. After this was signed up and returned to you, was the plaintiff put to work or not?
A. Yes sir.
Q. In what capacity?
A. As a student brakeman first, and afterwards as a regular brakeman.
Q. When was he put to work as a regular brakeman?
A. I can tell by referring to my seniority list; I have it here in my pocket.
198 Q. Just refresh your recollection.
A. His date is 4/10/10; April 10, 1910; that is his seniority date.
Q. He was assigned regular duty on that date?
A. Yes sir.
Q. Now, before assigning him to regular work, was the plaintiff required to pass any examination?
A. Yes sir.
Q. What was the nature of that?
A. It was an examination on our transportation rules. He first has to make student trips until the trainmen say he is competent, and then I examine him on transportation rules.
Q. Did you examine him on the book of rules that was in force at that time?
A. Yes sir.
Q. State whether or not he showed he was familiar with them?
A. Yes sir, passed the examination.
Q. Is Defendant's Exhibit 2 a copy of the book of rules that was in force at that time?
A. Yes sir.
Q. And that is the book of rules that you examined the plaintiff on?
A. Yes sir.
Q. Was he furnished with a copy of this for his own permanent use?
A. Yes sir.
199 Q. Mr. Hohnsbeen, as superintendent, did you attract particular attention of the plaintiff to any of those rules in particular before he went to work?
A. Yes sir.
Q. Just give the numbers of them?
A. 634 to 638, inclusive, in our rules.
Q. Now, I will ask you to state whether or not —, as part of your

duties as superintendent to see that the trainmen performed their duties?

A. Yes sir.

Q. To carry out the rules and instructions of the company?

A. Yes sir.

Q. Did you ever have occasion prior to the time of this accident to call the plaintiff's attention to any carelessness on his part?

A. Yes, I had him in the office once or twice, and also administered discipline once or twice.

Q. What was the occasion of that, Mr. Hohnsbeen?

A. I don't recollect without referring to the file. I remember one case where Conductor Swartz turned him in to me.

Mr. Cruce: We object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. State whether or not there was one occasion where he had gone past a switch?

A. Yes I remember that.

Mr. Cruce: We object, if the Court please?

200 The Court: Sustained.

Mr. Klienschmidt: We think it is material to show that the plaintiff had been warned about carelessness.

Mr. Cruce: We withdraw the object-. We shall ask, however, to apply the same rule to the engineer when we put him on.

Q. Just state what was the cause of Mr. Brown's having been reprimanded.

A. The case that Conductor Swartz had, he——

Mr. Cruce: Don't tell what Conductor Swartz said.

Q. What was he cautioned against doing? What did you caution him against doing when the case was reported to you? Did you caution him against doing or not doing anything, do you remember?

A. I cautioned him against the thing for which he was turned in.

Q. What was that he was turned in for?

Mr. Klienschmidt: If the Court please, he can tell what he said to this witness.

The Court: Can you say what you said to the plaintiff? What did you say to the plaintiff when you called him in?

A. I can't remember the exact language.

Q. Remember the substance?

A. I told him he would have to be careful or hit the ball.

Q. What did you say?

A. I told him he would have to be careful and hit the ball, and be careful.

Q. What does that mean, hit the ball?

A. Do a job of railroading.

201 Q. Does that mean——

A. To comply with the rules and get out and do a job of brakeman; that is what it means, hit the ball.

Q. Now, I don't believe you explained—you said before had been turned in to you, *what* explain what that means?

Mr. Cruce: We object to anything that any conductor or any official said to him in the absence of plaintiff. We object to what anybody else did. We object to any statement to anybody turning him in.

The Court: He don't seek to ask the witness that at all.

Cross-examination by A. C. Cruce:

Q. What rule was that?

A. 634 to 638.

Q. Now, 634 reads this way: All employes will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury and must not go between cars when they are in motion. You told him it was dangerous to go between cars when they were in motion?

A. Yes sir.

Q. And he understood that, didn't he?

A. Yes sir.

Q. Where were you when you told him he would have to hit the ball; where did that conversation occur?

A. I don't recollect, but I believe it was in my office.

Q. Where?

A. At Hugo.

Q. How long had he been working for the railroad?

202 A. I couldn't tell without referring to the record. I think it was about three months before he was injured; something like that.

(Witness excused.)

D. T. CHAMBERLAIN, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury, please?

A. D. T. Chamberlain.

Q. Where do you live?

A. Hope, Arkansas.

Q. What is your occupation, Mr. Chamberlain?

A. Locomotive engineer.

Q. For the Frisco railroad?

A. Yes sir.

Q. How long have you been in the railroad service, railroad business?

A. I have been running a locomotive about seventeen years.

Q. You were an engineer on the train that plaintiff here was braking on in February of last year?

A. Harry Brown?

Q. Yes.

A. Yes sir.

Q. On that day, between what points was that train running?

203 A. Hope and Ashdown.

Q. In Arkansas?

A. Yes sir, both points.

Q. What time did you arrive at Ashdown that day?

A. I have no record of the time with me.

Q. Was it morning or afternoon?

A. It was before noon, yes sir.

Q. What were you engaged in doing just prior to the accident? What was the crew of the train engaged in doing?

A. That covers a good deal of ground.

Q. Were you switching cars?

A. Yes sir, switching.

Q. Making up your own trains?

A. It seems to me we were doing station work at the time he was injured; that is, doing stave mill switching, it seems to me we were.

Q. You are familiar with the arrangement of the tracks there at Ashdown, are you?

A. Yes sir.

Q. Look at plaintiff's exhibit A. Is that a fair representation of the location of the tracks at that place?

A. Yes, fair; only fair.

Q. Just prior to the accident, you had gone into the M. P. & G. connection, backed in there with a string of cars?

A. Yes sir.

Q. Who was giving the signals to you at that time, which

204 brakeman?

A. Brown was following the engine.

Q. He was what is known as head brakeman?

A. Yes sir.

Q. That is the brakeman that looks after the head of the train?

A. He is the brakeman that follows the engine.

Q. After you backed in on that connection, what did you do?

A. I have no recollection; I don't remember those moves as they came.

Q. Did you stay in the connection, or did you come out?

A. We pulled out of the connection.

Q. That is, out onto the passing track?

A. Yes sir.

Q. Now, did Brown give you any signal after you got on the passing track?

Mr. Cruce: We object to that as leading.

A. After I pulled on the switch there, the signal was given to stop.

Q. What is that movement?

A. Downward movement of the arm.

Q. With the arm held out at the side?

A. Yes sir.

Q. Then what did Brown do?

A. There is a point right there that I am not sure. He gave me a

signal to back up, but whether it was after or before he threw the switch, I don't remember. He gave me a signal to back up. Now, it is a common custom——

The Court: Don't tell what the custom is; state what he did.

205 Q. Now, he threw the switch, did he; Mr. Brown did?
A. Yes sir.
Q. After you got past the switch there, you say Brown gave you a stop signal. Did you obey the signal?
A. Yes sir.
Q. What, if anything, did Brown do then, after you came to a stop?
A. There is the point that this other brought up. The signal was given to back up and I obeyed that, but whether this signal was given before or after he threw the switch, I don't know.
Q. It was given before or after he threw the switch?
A. Yes sir.
Q. Is that the way it was done?
A. The two signals were given.
Q. First a stop signal and then a back-up signal?
A. Yes sir.
Q. Now, did Mr. Brown give you a hold signal?
A. Not that I saw, no sir.
Q. Was he in plain sight of you?
A. He was in plain sight of me during all these moves, yes sir.
Q. Your place in the cab was on the right hand side, was it?
A. Yes sir.
Q. That would be on the north side of the track?
A. Yes sir.
Q. And the switch stand was on the north side of the track?
A. Yes sir.

Q. After Brown gave you the signal to back up, just show
206 the jury how that is given?

A. Now, that goes—he would be behind the engine, and the signal would be something like this, just the same as you would motion anyone to come towards you.
Q. Did you obey that signal or not?
A. I did.
Q. What did Brown do?
A. Along, after the engine started to move, along about that time sometime, Brown stepped in behind the cars.
Q. While the car was moving?
A. Yes sir.
Q. Did you get another signal from him?
A. No sir.
Q. What was the next signal you got from anybody?
A. The next signal I got was a stop signal from brakeman Godbold.
Q. Where was he?
A. He was down some three or four or may be five or six cars away.

Q. What direction were those cars?
A. East.
Q. Those were the cars standing on the passing track?
A. Yes sir.
Q. Did you notice how far those cars on the passing track were from the last car that you had hold of?
A. I couldn't make an accurate statement there now, as I have no memory of it much.
Q. Was it a long distance or a short distance?
207 A. It was some three or four cars away, but I couldn't give an accurate estimate of the distance.
Q. When Godbold gave you this stop signal, did you obey it or not?
A. It was obeyed immediately.
Q. What did you do then?
A. At that point, I remained on the engine, and so did the fireman, because we didn't know why the signal was given.
Q. When did you know Brown was hurt?
A. Godbold came up to us and told us.
Q. Then what did you do?
A. The fireman went back to him; I stayed on the engine three or four minutes before I went back.
Q. Then what did you do?
A. I don't know whether I went back or not; we cut loose from the cars and got a caboose. The usual excitemen- took place after an accident of that kind.
Q. How far did the cars that you had hold of with that engine run west past that switch stand after you came out of the M. P. & G. connection?
A. That is a point I couldn't give an absolute answer to. I wouldn't say over a car length, because that is about the usual distance we run out of a place like that.
Q. Now, what speed did you pull those cars out of the M. P. & G. connection, coming out on the passing track?
A. I can only answer that question along the lines of what speed is generally used. To say that I remember what speed I was using at that time, I can't answer.
Q. What is your best judgment about it?
208 A. Four or five miles an hour.
Q. Now, from your experience as a trainman, what would have been the safe way for Brown to have arranged the knuckle on that car for coupling?
A. The safe way would have been to *g*ave given me a stop signal where I would have seen it.
Q. That is, you mean to arrange the couple before he gave the back up signal?
A. Yes sir, or to follow, if he did give me such a signal, to be certain that I did get him.
Q. Are you certain that he didn't give you such a signal?
A. I never saw it.
Q. Were you looking at him all the time?

A. My attention was on him all the time.

Q. I will ask you if there was a safe way to arrange that soupling while the cars were coming out of the M. P. & G. connection?

A. There is not a practical way to arrange them while they were pulling out.

Q. If the train wasn't going any faster than a walk, it would have been perfectly safe to have followed them out?

A. That would have been safe in operating the lever. The lever would have been operated from the side of the car.

Q. That is from the south side of the car?

A. Yes sir, the lever would be on the south side of the car.

Q. After you got down off of the engine, after you were informed of the accident, did you have occasion to notice where the accident happened where Brown was run over?

209 A. No sir, I didn't, from the fact that I said a minute ago, during the immediate part of the accident and taking care of Mr. Brown, those points were overlooked.

Q. What is your estimate or judgment as to how far you backed those cars after Brown gave you the back-up signal, and before they were again stopped by Godbold?

A. As I remember the situation now, probably four car-lengths, as I remember the situation.

Cross-examination by A. C. Cruce:

Q. Who was in the cab with you, the engine?

A. Fireman Baird.

Q. Anyone else?

A. Not that I know of.

Q. Do you know Frank Robison?

A. Yes sir.

Q. He was in there, wasn't he?

A. I said I didn't know it if he was.

Q. Do you know it now?

A. No sir.

Q. What is your recollection if he was in there?

A. Didn't I just tell you I didn't know.

Q. If he was in there, he had no right to be there, did he?

A. Yes sir, he had a right to be there.

Q. Frank Robison?

A. Yes sir.

Q. Doesn't rule 565, that you have just identified, provide that engineers will not permit anyone to ride on the engine without proper authority?

210 A. He was a brakeman.

Q. And he had a right to be in there?

A. Yes sir.

Q. Was Frank Robison on duty then?

A. Yes sir.

Q. What was he doing then?

A. He was helping the other crew.

Q. What other crew?
A. There was another crew there in the yards, getting ready to leave.
Q. Getting ready to leave where?
A. I don't know.
Q. Whose crew?
A. I don't know.
Q. How do you know there was another crew there?
A. I saw them there.
Q. Don't you know that the crew that was there was making up, waiting for the train to be made up, to bring it on to Hugo?
A. I know there was a crew there waiting for that.
Q. And those were the cars that you were shaping?
A. I don't know that they were.
Q. You were told that they were?
A. No, I wasn't.
Q. What were you switching those cars for?
A. I don't know; that is not my business.
Q. You were just on the engine there, running a car and not knowing what it was for?
A. No sir.
211 Q. Where had you come from that day?
A. Hope.
Q. And brought a car up to Ashdown?
A. I don't know whether we did or not; I have no record of it.
Q. Did you not?
A. I don't know.
Q. How did you get from there up to Ashdown?
A. I rode on the engine.
Q. Didn't you bring a train of cars?
A. I don't know; I have no record of it.
Q. You understand, you are under oath, and you tell the jury that you came from Hope and Ashdown on the engine?
A. Yes sir.
Q. And you don't know whether that engine pulled a train or not?
A. I have no record of it.
Q. Do you know this man, Godbold?
A. Yes sir.
Q. You, as engineer, you cut his arm off since then, didn't you?
A. He had an accident.

Mr. Klienschmidt: That is objected to as improper and prejudicial.

The Court: Gentlemen, you will pay no attention to that.

Redirect examination.

By Mr. Klienschmidt:

Q. Mr. Chamberlain, you say there was another crew there, waiting in the yards?
212 A. Yes sir.
Q. That was the crew that had charge of the local, west bound?

A. It was not the west bound local, but I don't remember the crew.
Q. You don't remember the train it was on?
A. I have no records of anything but the movement of the engine; that is the only record I keep.
Q. In other words, you don't charge your mind?
A. No sir.
Q. With what cars you move?
A. No sir, I keep no record; I have nothing to do at all with that part of it; the locomotive is all I have charge of.
Q. Your run that day, as I understand, was from Hope to Ashdown?
A. Yes sir.
Q. And from Ashdown back to Hope?
A. Yes sir.
Q. Hope is where you tied up?
A. Hope is my home, yes sir.

(Witness excused.)

H. H. BAIRD, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. What is your name?
—. ——.
213 Q. Mr. Baird, where do you live, please?
A. I live at Hugo, Oklahoma.
Q. What is your business?
A. That of locomotive fireman.
Q. For the railroad company?
A. Frisco Railroad, yes sir.
Q. How long have you been in the railroad business?
A. I have been in the service a little over seven years.
Q. As fireman?
A. No, it will be seven years the first day of next July, as fireman.
Q. Were you firing on the engine in which Chamberlain was engineer, the one Brown was hurt at Ashdown?
A. Yes sir.
Q. Which side of the engine were you riding on?
A. The left side?
Q. That is the fireman's side?
A. Yes sir.
Q. Now, do you remember what movements were made by the engine, and the cars attached to it, before you went back onto the passing track?
A. The best I can remember the movement, we pulled west and started out of the M. P. & G. connection, and started to back back east on the passing track.
Q. Well, do you know where Brown was at that time?
A. No sir.

Q. He wasn't on your side of the engine?
A. No sir, they all work on the engineer's side, except in the oil mill, at Ashdown.
214 Q. Do you know how far the cars attached to the engine were pulled west from that switch?
A. No sir, I don't. I wasn't in a position that I could see the switch stand; it was on the north side of the track, and I couldn't see it.
Q. After they came to a stop, how far were the cars backed up on the passing track before they were again stopped? Can you estimate?
A. No sir, I couldn't tell you how far they were backed back.
Q. Have you any judgment in the matter at all?
A. No, nothing only that it wasn't any great distance, nothing like eight or ten car-lengths, I couldn't think, but I wouldn't try to put it in a car-length or two of it at all.

Cross-examination by A. C. Cruce:

Q. Did you see Brown after he was hurt?
A. Yes sir.
Q. Did you go back there?
A. Yes sir, I went back there.
Q. Where did you find him?
A. Well, sir, when we were notified of his injuries, I jumped off the engine and started back, and he was lying with the hands over the main line, one rail of the main line, and his feet was between the main line and the passing track, and I took hold of him and laid him down between the tracks, the passing track and the main line.
Q. What shape was his feet in?
A. There was one foot that was badly mashed in here, and
215 the right one was mashed down the instep, and the left was mashed right in here, the best of my memory.

Redirect examination.

By Mr. Klienschmidt:

Q. Did he say anything about how he happened to fall?
A. Yes sir, I asked him how he happe-d to an accident and he said he slipped and fell.

Recross-examination by A. C. Cruce:

Q. Did you take hold of this young man?
A. Yes sir.
Q. You had to hold him there, did you?
A. No, I didn't have to hold him. I just took hold of him. He was lying kinder on his hands and knees, and I just placed him back between the tracks, on his back, and began to rub his face and hands.
Q. Did he seem to be suffering?

A. Yes sir, seemed to be. We got him as quiet as we could. I didn't want him to holler and take on any more than he could out there until we could get medical aid.

Q. You got medical aid there as quick as you could?

A. Yes sir, we sent a negro to the mill for the doctor——

Q. Where was Mr. Robinson?

A. I think Mr. Robinson helped me lay Mr. Brown between the tracks; I wouldn't be sure, but I think he was the man.

216 By the Court:

Q. Do you know the signals?

A. Yes sir.

Q. What does that mean (Indicating)?

A. Spot sign.

Q. What does that mean?

A. Give time between, or that they ain't going to move any more on the spot. After you have stopped, that means stand still until further signals.

By Mr. Klienschmidt:

Q. You didn't see any spot signals given there?

A. No sir.

(Witness excused.)

JOE PIERCE, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.

A. Joe Pierce.

Q. Where do you live, Mr. Pierce?

A. At Hope, Arkansas.

Q. What is your occupation?

A. Conductor.

Q. For the Frisco?

A. Yes sir.

Q. How long have you been in the railroad business?

217 A. About twenty years.

Q. In what capacity?

A. Brakeman and conductor.

Q. Has that experience been *or* freight or passenger trains?

A. Both; mostly on freight.

Q. Were you employed as conductor in February, 1911?

A. Yes sir.

Q. Were you the conductor of the train on which Brown was braking when he was injured?

A. I was.

Q. On that day, between what points was that train running?

A. Between Ashdown, Arkansas, and Hope, Arkansas.

Q. Which place did you start?

A. Started at Hope.

Q. And ran to Ashdown?
A. Yes sir, and turned and returned to Hope.
Q. The same day?
A. Yes sir.
Q. What time did you get to Ashdown, Mr. Pierce?
A. 10:25 A. M.
Q. What was the crew engaged in doing after that arrived there until this accident?
A. Doing the station work around Ashdown, and making up the train to take back east.
Q. Where were you at the time of the accident?
A. At the depot.
Q. What were you doing?
A. Checking up the way-bills.
218 Q. What was the first you heard of the accident?
A. Mr. Brakeman Godbold came up with the engine and caboose, and told me that Mr. Brown had got injured.
Q. Did you go to the scene of the accident?
A. I went back with them, yes sir, on the caboose, took the caboose back to where Brown was.
Q. What did you do with Brown?
A. Put him in the caboose and took him back to the depot.
Q. What did you do about furnishing medical aid?
A. We had the doctor over in a few minutes, as quick as we could get one.
Q. Then what did you do with him?
A. The doctor took charge of him, and after we got ready, we sent him to Hugo on a special train, en route to the hospital.
Q. Sent him on a special train to Hugo?
A. Yes sir.
Q. Did you on that day have occasion to notice where this accident happened?
A. Yes sir.
Q. Look at this photograph that I hand you (Indentified by the stenographer as defendant's exhibit 7)—I hand you defendant's exhibit 7 and ask if that is a correct representation of that passing track there at Ashdown, looking east?
A. Yes sir, that is a very fair representation.
Q. State whether or not this switch stand at the left of the picture is the switch stand for the M. P. & G. connection?
A. It is.
219 Q. You say you made a note of where the accident happened? You made an examination of the track conditions there to ascertain where the accident happened?
A. Yes sir.
Q. How far east of that switch stand do you say that Brown was run over?

Mr. Cruce: We object to that for two reasons: he has already stated that he didn't know where it happened and this question is leading.

Q. Did Mr. Brown tell you where the accident happened?

A. No sir, he didn't point out the exact spot, but the blood was on the rail, you could see where it happened.

Q. Where was that please?

A. It was about twelve or thirteen feet from the end of the switch point.

Q. Which way?

A. East.

Q. How many feet would that be east of the switch stand, as near as you can get it?

A. Just about twelve feet from the switch point, and the switch stand would be about four feet from the opposite rail, on the north side of the track.

Q. Now, what do you mean by the switch point on this photograph? Is that on the south or north rail?

A. It is on the south rail; this is the switch point (Indicating.)

Q. That is the point of the connection?

A. Yes sir.

Q. From the end of that switch on the south side of the
220 track is what is called the switch point?

A. Yes sir.

Q. You say the blood was on the rail twelve or thirteen feet——

A. East of that point—extreme west end of that point.

Q. And that would be more than twelve or thirteen feet east of the switch stand?

Mr. Cruce: Objected to as leading.

The Court: Sustained.

Q. How far would it be east of the switch stand?

A. Straight across the point, it would be about twenty feet; if you go diagonally across to that point, it wouldn't be quite so far.

Q. I mean east and west. Where do you want to start to from the switch point across here east?

A. It would be something like eighteen or twenty feet; something like that.

Q. Were there any blood indication on the rail at any other point except that? Was that the only point you saw blood on the rail?

A. Yes sir, just a place may be eighteen or twenty inches long on the rail.

Q. Did Mr. Brown tell you in the course of conversation how he came to be hurt?

A. When I asked him how it happened, he told me.

Q. What did he say?

A. He said he stepped in front of the car and fell.

Q. What was the number of the car that ran over Brown?
221 A. 27,442, I believe is the number of it.

Q. Do you know what were the initials of the car that——

A. C., St. P., M. & O.

Q. What kind of a car was it?

A. Box car.

Q. Was it loaded or empty?

A. Empty.

Q. Did you make an examination of the coupling apparatus at

the east end of the car, or did you see an examination made right after this accident?

A. Yes sir.

Q. Who was present at that time?

A. Car inspector Jakes.

Q. That is, the coupler on the car that ran over Mr. Brown?

A. Yes sir.

Q. What kind of a coupler was that car equipped with?

A. What is known as the La Trope.

Q. Is that a coupler that couples automatically, by impact?

A. Yes sir.

Q. How is it operated?

A. By a hand lever on the side of the car.

Q. Which side of the car was that lever on?

A. On the south side.

Q. What inspection or examination did you and Mr. Jakes make of that coupler?

A. We tried the lever to operat- the pin lifter to open the knuckle.

Q. Was that done before the coupler had been changed or
222 distrubed?

A. Yes sir.

Q. And before it was coupled to any other car?

A. Before the car had been moved.

Q. When you operated that lever on the south side of the car, state whether or not it threw the knuckle open?

A. It opened the knuckle so it would couple all right; threw the knuckle open like it was made to work; worked in good order.

Q. Did you try that only once or more than once?

A. I tried it there at Ashdown and Mr. Jakes tried it.

Q. Was there anything the matter with the coupler?

A. Not a thing that I seen.

Q. What is the proper way to operate one of these automatic couplers?

A. They are made to operate with a hand lever from the outside of the car.

Q. This coupler did operate that way?

A. Yes sir.

Q. Without putting your hand on the knuckle?

A. Not necessary to put your hand on the knuckle.

Q. I will ask you to state if that coupler was in condition so that it would work, and that it did work without a man going in front of the car, or on the track?

A. It worked when we tried it, by standing at the side of the car and working the lever.

Q. That is on the outside of the track?

A. Yes sir.

223 Q. Now, when operated in that way, is that safe for a brakeman or not?

A. Yes sir, it is safe. It is a safety appliance. If it wasn't everybody would get killed that ever tried to open one.

Q. Now, did you make any examination of the coupling apparatus on the other car?

A. Yes sir.
Q. That is the car that was stationery on the passing track, which was to be coupled on to the C., St. P., M. & O. car?
A. Yes sir, we tried the coupler on that.
Q. What kind of a coupler was that?
A. A Tower.
Q. Is that an automatic coupler?
A. Yes sir.
Q. That couples automatically, by impact?
A. Yes sir.
Q. What was the condition of that coupler?
A. It was in good working order.
Q. What was the lever on that car?
A. It was a continuous lever.
Q. That is, it operates from either side?
A. Yes sir.
Q. That is, you are speaking of the west end of that car?
A. The west end of the car.
Q. Did you make this examination immediately after the accident?
A. We examined both cars at the same time.
224 Q. What did you do with this other car—By-the-way, what was the number of this car that was on the passing track?
A. It was an A. C. L. car; I forget what the number of it is; I don't remember the exact number.
Q. It was an Atlantic Coast Line car?
A. Yes sir.
Q. Did you make the car report which shows the cars in that form?
A. Yes sir.
Q. I will ask you to look at that and refresh your memory, if you can, as to the number of this Atlantic Coast Line Car?
A. 29,929.
Q. What examination did you make of that Atlantic Coast Line car, as to the condition of the safety appliances, the couplers?
A. We examined it, operated the knuckle, to see that it worked.
Q. How did you operate the coupler?
A. We operated it with the pin lift.
Q. With the lever?
A. Yes sir.
Q. When you pulled or turned the lever, did it operate the coupler and throw the knuckle open?
A. Yes sir.
Q. Could you do that while standing at the side of the car?
A. Yes sir.
Q. And not on the track?
225 A. No, you don't need to go on the track to operate it.
Q. What is the safe way for a brakeman to prepare cars for coupling by impact?
A. To open the knuckles.
Q. How?

A. With the pin lifter.
Q. With the lever?
A. Yes sir.
Q. Standing where?
A. You have got to stand at the end of the car.
Q. There is where the end of the lever is?
A. Yes sir, the end of the lever is right at the end of the car.
Q. That is the car—you mean, or lever, will be at the end and on the outside of the car?
A. No, it is not on the outside; just in the clear; just inside of the car, four or five inches.
Q. Can a man, standing at the outside of the car, operate the lever on the end of the car?
A. Yes sir.
Q. Were you present when an examination of the couplers on both these cars was made at Hope?
A. Yes sir.
Q. Did you take both of these cars to Hope in your train?
A. Yes sir.
Q. On the same day of the accident?
A. Yes sir.
Q. What was done with them after they arrived there?
226 A. Left in the yards at Hope.
Q. How were they left? Were they left coupled together, or what?
A. Yes sir.
Q. With the same couplers they had over at Ashdown?
A. Yes sir.
Q. When was this examination made, the second examination?
A. I think it was the second day after the cars went in there.
Q. The 22nd of February?
A. Yes sir.
Q. Who was present?
A. Mr. Baker and car inspector Herring.
Q. Was Mr. Godbold present?
A. Yes sir.
Q. Mr. Roberts?
A. Yes sir.
Q. Mr. White?
A. Yes sir, Bails, W. D. Bails.
Q. Now, what was the result of that inspection?
A. The couplers were found working properly.
Q. When you went down to make the inspection, were the cars still coupled together?
A. Yes sir.
Q. Did you uncouple the cars by operating the lever?

Mr. Cruce: If the Court please, he has lead the witness long enough.
The Court: I think so.

227 Q. Tell what you did?

A. We separated the cars before the inspectors came down there; that is, before Mr. Baker or the inspector.

Q. How did you separate the cars?

A. Just pulled the lever and separated them before the inspecters came around.

Q. Then what did you do?

A. When Mr. Baker came up we all went down and inspected them.

Q. What do you mean by inspection?

A. We went down and operated these pin lifters or levers, and saw that these knuckles worked, operated the way they are made to operate.

Q. Was that on one car or both of them?

A. Both.

Q. What was the result of your inspection?

A. They were found to be working properly.

Q. Both of them?

A. Both of them.

Q. I will ask you to state whether or not they would couple automatically by impact, without going between the cars?

A. Yes sir, they would.

Q. And did couple?

A. Yes sir; and did couple.

Q. When you went down there right after the accident, Mr. Pierce, did you take any note of how far apart these two cars
228 were? That is, the C., St. P., M. & O. car and the Atlantic Coast line car there at Ashdown?

A. Yes sir; they were standing something like fifty or seventy-five feet apart.

Q. That was immediately after the accident?

A. That was when we went down and made the inspection, yes sir, just after we had taken care of Mr. Brown.

Q. Were the cars like they were at the time of the accident?

A. Just like they were; the engine hadn't been in there.

Cross-examination.

By Mr. Cruce:

Q. You had come in from Hope that morning?

A. Yes sir.

Q. Got there at 10:25?

A. Yes sir.

Q. Where did you leave your train?

A. Which train?

Q. The one you came in on?

A. We distributed it around the yards in Ashdown, where it belonged; put our merchandise cars on the tracks they belonged on.

Q. Was there an extra crew in there, another crew of men there?

A. Yes sir.

Q. What were they waiting for?

A. Waiting for the stuff we brought in?

Q. What do you mean by that? You mean the cars that
229 you brought in from the east?

A. The cars that we brought in from the east, they were going to take them on west.

Q. This other crew?

A. Yes sir.

Q. Whose crew were they?

A. Conductor Sanders.

Q. Where did that run go? From Ashdown on west to Hugo?

A. Yes sir.

Q. How many of those cars were to be taken on west?

A. I don't remember; I don't remember how many we had.

Q. Did you have any cars in your train that were to be taken on out to Hugo?

A. That I brought in there?

Q. Yes.

A. I couldn't say where they were to be taken to now; I don't remember.

Q. I understood you to say awhile ago that you had to switch in some of the cars that you brought in for them to take on west?

A. Yes sir.

Q. How many of them did you have?

A. I don't remember.

Q. Wouldn't your car record show?

A. Yes sir.

Q. Where is that record?

A. Right there in my overcoat pocket.

Q. Will you get it?

230 A. Yes sir.

Q. I wish you would get it and see where those cars were going. How many cars were there in that you brought into Ashdown that morning?

A. I brought in two cars, both of them for Ashdown.

Q. You just had an engine and two cars?

A. Yes sir.

Q. Didn't have any caboose?

A. Yes, two cars and the caboose.

Q. What did you mean awhile ago when you said you distributed cars you brought in to the different places?

A. We put them in to the merchandise tracks.

Q. When did you make that report?

A. On the second and 20th, 1911.

Q. You just had two cars that you brought in?

A. Yes sir.

Q. Now, what two cars were they?

A. This little bunch here is log cars that we left before we got to Ashdown.

Q. Where did you leave them?

A. One at a little place we call Thrasher and the others we left at mile post 662.

Q. What are these two cars here?
A. Those are the two cars of merchandise that goes to Ashdown.
Q. What did you mark them under the head of empties for?
A. That book is my personal property and I can keep it in any manner that suits me. That was my record and I under-
231 stand it.
Q. What under car number is that number B kind of car?
A. The book is supposed to be wider than it is.
Q. What part of it have you cut off?
A. You can see out here where it says division.
Q. Yes.
A. That part is cut off so it fits my train book cover. There is the two cars that we brought into Ashdown, just these two. This one we left at Thrasher, and these were left at Lathridge.
Q. What does it show of this record that you left them out there?
A. W 662.
Q. What does that mean?
A. That means that that is the mile post on that division.
Q. Where is the mile post on that division?
A. It is at W 662.
Q. Why didn't you keep the other two cars, the empties?
A. These two are loaded.
Q. The loaded ones then?
A. I left them at W 647; that is Ashdown.
Q. You stated awhile ago that you had brought in cars from Hope, some to be distributed there and some to be turned over to the crew that was going west, didn't you?
A. Yes, that is what I said.
Q. That wasn't right, was it?
A. I told you I didn't know what I had for the west.
Q. You say now you didn't have anything for the west?
A. I hadn't looked up that record; I hadn't paid any atten-
232 tion to that, didn't know the train of two cars were in question at all.
Q. When did you get this record?
A. That trainbook?
Q. Of course I am talking about this.
A. I made that, Mr. Cruce, on my arrival at Ashdown, before Mr. Brown got injured.
Q. In 1911?
A. Yes sir.
Q. Have you been using it ever since?
A. No sir. I filed it away. I have, I suppose, seventy-five of them.
Q. When did you file this away?
A. The date is in the back of the book.
Q. With whom?
A. With myself.
Q. You didn't turn it over to the railroad?
A. No sir.
Q. What are you laughing about, Mr. Pierce? Have you had a

conference with anybody representing the railroad since you came here, about this book?

A. No sir.

Q. Have you showed this book to any of them?

A. No, I don't believe that I have.

Q. Don't you know whether you have or not?

A. That *has* no one asked for it. I had it in my pocket when I started up here.

Q. Has anybody seen this book since you came up here?

233 A. Not that I know of.

Q. What are you laughing about?

Mr. Klienschmidt: I suggest to the Court that that is the natural state of the witness; smiling.

A. Mr. Cruce, I am not amused.

Q. I asked you this, a very simple question, whether you had shown this book to Mr. Baker or any of the attorneys for the railroad since you have been here?

A. I know I haven't shown it to Mr. Baker. I have had that book in my hand down at Mr. Klienschmidt's office, but I don't know whether he looked at it or not.

Q. You did have this book in your hands in your conference there, didn't you?

A. Yes sir.

Q. What did you have it out for?

A. I got it out to get these papers out.

Q. What are those papers?

A. They are just *disposition* that we got—instructions that I got in regard to what to do with Mr. Brown. The judge can look at them if he wishes, or any of you.

Q. What does M. D. & G. connection mean?

A. That is another little railroad that runs across the Frisco tracks at Ashdown, and that M. D. & G. Connection is where we gave them business, and got business from them.

Q. Where was the train crew of Mr. Sanders going that day?

A. I have nothing to do with them. I don't know that I know where they were going.

Q. What did you mean awhile ago when you said they were

234 going out west?

A. They came in from the west and were not going on through.

Q. Where did their run go to?

Mr. Klienschmidt: I object to that as wholly irrelevant, incompetent and immaterial, and has no connection with this suit.

The Court: I will let him answer if he knows.

Q. Where did their line go to, west of Ashdown?

A. They could run them to Hugo, or wherever the dispatcher wanted to run them to.

Q. One of these cars is number 29,929. Do you know where that car is now?

A. No sir.
Q. Have you ever seen it since?
A. No sir, I don't know that I have.
Q. That is a C., St. P., M. and O. What does that mean?
A. That is the name of a railroad up in Minnesota.
Q. That meant that the car belonged to them?
A. Yes sir.
Q. It didn't belong to the Frisco, then?
A. No sir, I think not.
Q. How did it get down there?
A. In the natural course of travel; somebody brought it in with the cars, or train.
Q. You took that car on back to Hope?
A. Yes sir.
Q. How long did it stay at Hope?
A. I couldn't tell you what day I brought it out of there, if
235 I ever brought it back.
Q. It wasn't a Frisco car, was it?
A. No sir.
Q. You said it was a Minnesota car?
A. It was what we termed a foreign car, some foreign line, foreign to the Frisco.
Q. When you took it from Ashdown back to Hope were you starting it back home?
A. No. We were using it at that time.
Q. How long did you use it before you started it back home?
A. We left it there. I don't know what became of it after we took it into Hope. The Hope people disposed of it.
Q. You took it into Hope empty?
A. Yes sir.
Q. Did you take it there to be loaded?
A. I don't know.
Q. At any rate, you didn't haul anything in it from Ashdown to Hope?
A. No sir.
Q. Were you instructed to take these two cars back to Hope?
A. Yes sir, they were going to Hope. That is the way—they were east bound cars.
Q. Was that the way they would have to go to get back to the Minnesota road?
A. I don't know that they were bound to the Minnesota road.
Q. I didn't ask you that. I asked you if that was the way to go to Minnesota?
A. I don't know.
Q. Now, this Atlantic Coast Line car, who did that belong to?
236 A. I don't know; it was a foreign car.
Q. Was it brought there empty?
A. I don't know. I took it out of there empty.
Q. Is there anything on it that indicates where it was to go to from Hope?

A. No sir.

Q. Is there anything in the record of the Frisco Railroad to show where that car went from Hope?

A. I haven't any record.

Q. I asked you if the railroad kept a record that would show where that car went?

A. I don't know what their record is. I have not got access to that record.

Q. You have been conductor for how long?

A. About twelve years.

Q. Now, listen to this question: Don't you know, from your experience with every railroad, including the Frisco railroad, keeps a record by which it can tell when its cars go to Ashdown, when the foreign cars come to their road and when they go back home?

A. Yes sir, they keep a record.

Q. Now, this Frisco has a record, then, that will show when these two foreign cars came in there, and when they went back home?

A. It will show disposition of the-, yes sir.

Q. It has that record, hasn't it?

A. Should have, yes sir.

Q. Have you seen this other car, this Atlantic Seaboard car, have you seen it since the accident?

237 A. Not that I know of.

Q. Now, this accident occurred about 11 o'clock?

A. 11:15

Q. How long had it occurred before you heard of it?

A. Possibly seven or eight minutes.

Q. What did you do when you heard of it?

A. I went down to where Mr. Brown was, from the depot.

Q. How far was he from the point of the accident?

A. He was right close to where he was injured, may be four or five feet.

Q. He hadn't been taken up then?

A. No sir.

Q. Doctor hadn't come?

A. No sir.

Q. You asked him then how it happened?

A. No sir.

Q. When did you ask him?

A. After we moved him in the caboos*k*se and brought him up to the depot.

Q. When was it you examined the place to see the blood on the rail?

A. When we went back down to examine the cars.

Q. After you put Mr. Brown in the caboose and took him up to the depot, you asked him on the way up there?

A. No sir, when I got there.

Q. And he said his foot slipped?

A. He said he slipped and fell. He didn't say his foot.

Q. Did he say anything about the car coupling being wrong?

A. No sir.

238 Q. You are sure about that?
A. Yes sir.
Q. Just said that he slipped and fell?
A. Yes sir.
Q. Did you have any reason to disbelieve that?
A. No sir.
Q. At any rate, then, after you had got him to the depot, you went back to examine the car?
A. When we had sent Mr. Brown on the way to the hospital.
Q. How long was that?
A. Possibly an hour and a half.
Q. Who did you go down — to examine the car?
A. Mr. Jacques.
Q. Who is he?
A. He is our car inspector at Ashdown.
Q. What did you take him for?
A. Took him along to help me examine the cars.
Q. You went on down there and took the car inspector to examine these knuckles?
A. Yes sir.
Q. What was the first thing you did when you got there?
A. That is the duty of the conductor.
Q. You took Mr. Jacques and went down there to examine the car?
A. Yes sir.
Q. And what was the first thing you did when you got there?
A. We looked over the ground where Mr. Brown had been, where he was injured.
239 Q. You saw blood?
A. Yes sir.
Q. Where did you see that blood?
A. Along the rail, on the track.
Q. How much blood was there?
A. Not much.
Q. Was there more on the rail that there was on the ground?
A. No sir.
Q. Where did it extend to from the rail?
A. Right out by the side of the rail, where Mr. Brown's feet were.
Q. How far from the rail?
A. About that far. (Indicating.)
Q. About eighteen inches?
A. Eighteen or twenty inches.
Q. On the south side of the rail or the north side?
A. South side.
Q. Now, there wasn't any blood south of twenty inches from that rail?
A. I couldn't swear it was just exactly twenty inches.
Q. About?
A. There is a little path between the tracks and the blood was right at the edge of the path, where the people walk up and down the track.

Q. You don't mean a path that he had made in walking himself there?
A. No sir.
Q. I understand you to say there was blood on that south rail?
240 A. Yes sir.
Q. That there was some blood that extended out eighteen or twenty inches from the rail?
A. What way do you mean?
Q. Was there or not?
A. Now, there was a pool of blood out from the rail.
Q. Then there wasn't any blood on south of that?
A. No sir, none that I saw.
Q. You looked?
A. Yes sir.
Q. There wasn't any blood there by the main track?
A. No sir.
Q. How far were those tracks apart there, the passing track and the main track?
A. About six feet.
Q. As soon as you examined this blood, you put down on your report, then, did you, about where you had found the blood?
A. Yes sir, I made a note.
Q. Then you and Jacques went and examined the car and couplings?
A. Yes sir.
Q. Which one did you examine first?
A. The one that Mr. Brown was injured on.
Q. That was the one that was attached to the engine?
A. That was the rear car from the engine.
Q. What was the first thing you did to examine that?
A. We tried the pin lifter, coupler.
Q. What reason did you have to expect that wazs out of fix?
A. We didn't expect it.
241 Q. What did you examine it for?
A. That is the requirements, to make our reports to the proper officers. These cars must be inspected by the inspector, in the presence of somebody; in the presence of one man.
Q. The couplings have to be inspected?
A. The whole car.
Q. What other inspection did you make of this car?
A. We looked after the safety appliances.
Q. You made a report of that?
A. Yes sir.
Q. Then, when you examined that, you then went and examined the couplings on the other car?
A. Yes sir.
Q. And yet this man hadn't opened his mo-th about either of these being defective?
A. No sir.

Q. He had stated to you that he slipped and fell?
A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. Mr. Pierce has by his questions to you tried to make it appear that we set a trap for him. I will ask you to state if you ever showed that book or said anything about the contents of it to any of the attorneys in this case?
A. I have not. I have had this book in my possession all the time, though.
Q. But you never showed it to the attorneys?
A. I opened it to get those papers out down in your office.
242 If — saw this book, you might have gotten it out of my pocket.
Q. While you were asleep at night?
A. You might have gotten it out of my pocket.
Q. You were asked why you went down there after this accident and examined these cars. Just explain why you did that.
A. It is absolutely necessary to render these reports to our superior officer, and here is the messages, the exact ones that I got that day for the report.

Mr. Cruce: Let me see that.

Q. You haven't read the message just now, but state if you were required by the company to make the report of the condition of the cars?
A. Certainly.

Mr. Cruce: We object to that. If the testimony is in writing, let him show it.

Q. Isn't that true any time there is any accident?
A. Yes sir.
Q. Whether to an employe or not, whether from machinery or not.

Mr. Cruce: It is a leading question, if the Court please.
The Court: Sustained.

Q. State why you made the inspection?
A. Question number 15, were cars, engine or machine inspected after the accident.
Q. Did you get that question before you made the inspection that day?
A. You have these in your possession all the time.
243 Q. It is your standard instructions that you have all the time?
A. Yes sir.
Q. So the company may know how the accident happened?
A. We keep these forms in our possession all the time, and make them out.
Q. I will ask you to state whether it is a part of your duties as

conductor of that train to make a report after every accident, stating the cause of it, and the conditions under which it occurred, etc.?

A. Yes sir.

Q. Do you object to me keeping this paper and examining it?

A. It is mine. If you want it, you can request it.

Q. I do request it now.

(Witness excused.)

DAN GODBOLD, called as a witness on the part of the defendants, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. What is your name?

A. Dan Godbold.

Q. Where do you live, Mr. Godbold?

A. I live at Hope.

Q. Are you married at this time?

A. No sir.

Q. Are you engaged in business or not?

A. No sir.

244 Q. What was your occupation in February, 1911?

A. Brakeman.

Q. For the Frisco?

A. Yes sir.

Q. Were you braking on the train that Mr. Brown was braking on at the time he was injured?

A. Yes sir.

Q. Between what points was that train running on the date of the accident?

A. Between Hope and Ashdown.

Q. In the state of Arkansas?

A. Yes sir.

Q. Where did you start from that morning?

A. Hope.

Q. Do you remember what time you got to Ashdown?

A. No, I couldn't tell you the exact time we got there; a little after ten o'clock, I suppose.

Q. Now, what were you engaged in doing? What was the crew engaged in doing just before the time Brown was hurt?

A. We were switching.

Q. Switching cars?

A. Yes sir.

Q. Was that—state whether that was making up the train or doing station work?

A. We were doing station work, and making up the train also.

245 Q. Now, referring to this place that has been introduced by plaintiff, as exhibit A. State whether you had gone into the M. P. & G. Connection with a string of cars to spot some cars there, just before the transaction?

A. Yes sir, we went into the connection.

Q. Did you ride the cars in there or go in with them?
A. Yes sir.
Q. Who else was along at that time?
A. Mr. Brown.
Q. Was he acting as head brakeman or rear brakeman?
A. Head brakeman.
Q. He was following the engine, in other words?
A. Yes sir.
Q. After you spotted the cars in there, what was done with the string?
A. We came out with the engine and what cars we had, and came against the passing track.
Q. Do you know how many cars the engine had hold of?
A. We had the caboose and about five or six cars, as well as I remember.
Q. Did you go along with those cars, or not?
A. No sir.
Q. What did you do?
A. I walked across to check the passing track.
Q. What do you mean by that?
A. I carried the switch list, gives the disposition of the cars.
Q. That is, the disposition of the cars that were sitting on the passing track?
A. Yes sir.
246 Q. How many cars were there left on the passing track?
A. Well, I couldn't tell you exactly how many; there were between seven and eight and nine.
Q. They were standing still there by themselves, no engine attached to them?
A. No sir.
Q. Now, can you say about how far the west end of these cars that were standing still on the passing track was from the switch from the east connection of the M. P. & G. connection?
A. That were between three and four car-lengths.
Q. East of that switch?
A. Yes sir.
Q. About how long would it be in feet? About how long is the average car?
A. Some is thirty-six and some is forty.
Q. It would be somewhere about a hundred feet?
A. No, it would be more than that.
Q. You say you walked from there to check these cars?
A. Yes sir.
Q. Did you observe what Brown did?
A. I saw Mr. Brown get off at the switch, and I couldn't see him any more.
Q. He got off at the switch?
A. Yes sir.
Q. Did he ride the string into the switch?
A. Rode it out to the switch?
Q. Yes.

A. Yes sir.

Q. Now, by the switch, do you mean where this switch track
247 is?

A. Yes sir, where the switch stand.

Q. For the M. P. & G. connection?

A. Yes sir.

Q. You saw Brown ride the car and dropped off about that switch track?

A. Yes sir.

Q. Did you see him come back to the cars that you were checking?

A. No sir.

Q. These cars that you were checking you say, the nearest one was over a hundred feet away from that switch stand?

A. Yes sir.

Q. What was the next you saw of Brown?

A. He was lying down on his hands and knees, between the passing track and the main line, shaking his head back and forth.

Q. That was after he was run over?

A. Yes sir.

Q. What did you do then?

A. I gave the engineer a stop signal.

Q. Did he obey it?

A. Yes sir.

Q. What did you do then?

A. I ran around on the fireman's side, past Mr. Brown, and ran up to the engineer, and told the engineer we had killed him, and the fireman and myself came back to him.

Q. Did you notice the point where he had been run over on the track? Could you tell by indications on the track where he
248 had been run over?

A. No sir, I never noticed anything on the track.

Q. What did you do with the plaintiff?

A. I didn't put my hands on him. Mr. Baird turned him over on his back.

Q. Did you go up to the station, or anyone else, to get help?

A. Someone got the connection, and we went on the main line and got the caboose. I helped put him in the caboose.

Q. Now, how fast was this string of cars miving out of the M. P. & G. connection toward the passing track?

A. I don't believe they were moving over three miles an hour.

Q. Now, I will ask you to state if Brown could have operated the lever and opened the knuckle on the coupler on the last car of that string while it was moving out on the passing track?

A. Yes sir, he could have got on the ground and followed it up and opened it.

Q. Moving at the rate of three miles an hour, would that, or not, be faster than a man could walk?

A. Well, I couldn't tell you.

Q. You think he could have followed it up behind the car and opened up the knuckle?

A. Yes sir.

Q. Would that have been a safe way to do it?

A. Yes sir.

Q. After Brown had been placed on the caboose and taken up to the depot, did you go back and notice whether there were indications on the rail as to where he had been run over?

249 A. Yes sir.

Q. How far was that point east of the switch point?

A. It was about fifteen or twenty feet.

Q. Look at this photograph that has been identified as exhibit 7, and state if that is a correct representation of the passing track there at Ashdown, looking east, showing the connection track?

A. Yes sir.

Q. Now, by the switch point, you mean that point on the right hand side of the track, the point of the switch? That is known as the switch point, is it?

A. Yes sir.

Mr. Klienschmidy: I would like to have this introduced in evidence, Defendant's exhibit 7.

Defendant's exhibit 7, which is a photograph, appears as follows:

(Here follows photograph marked page 249.)

250 Q. At any time after the accident, Mr. Godbold, did Brown tell you how he came to get hurt?

A. Yes sir. I asked Mr. Brown how he done it. He said he was opening a knuckle and slipped and fell.

Q. Did you say anything about whether the cars were stationary or moving?

A. No sir.

Q. Didn't say anything about that?

A. No sir.

Q. Were you present when the couplers on these two cars were inspected at Hope?

A. I was present when they inspected the couplers on the car that ran over Mr. Brown.

Q. Do you know what the number of that car was?

A. 27442.

Q. Do you know the initial of the car?

A. C. St. P. M. & O.

Q. What kind of a coupler was on there?

A. Latrope.

Q. How did it work?

A. It worked automatically.

Q. What do you mean by that?

A. Give the lever a quick jerk, and the coupler would fall open.

Q. When the knuckle is open that way, will any other car couple onto it by impact?

A. If the drawheads are sitting straight they will couple, and if they are not, they won't.

251 Q. Was this car coupled onto the A. C. T. car by impact after having opened the knuckle by the lever at the time of the inspection?

A. At Hope?

Q. At Hope, yes?

A. No sir, they were cut when I went down in the yard.

Q. Were you there when they pushed them together and coupled them up?

A. No sir.

Q. You didn't see them coupled together?

A. No sir.

Q. You saw the lever operating the knuckle, or throw the knuckle open?

A. Yes sir.

Q. That is, while standing outside of the track, you could operate the lever, you say?

A. Yes sir.

Cross-examination by A. C. Cruce:

Q. You had charge of the switch card that day?

A. Yes sir.

Q. And you—of course that was the card that directed where the cars were to be left and what were cut in and cut out, etc.?

A. Yes sir.

Q. And this boy had to follow your directions with reference to what cars to cut out, etc.?
A. Yes sir.
Q. Now, what did you say the number of this car was?
A. 27,442.
Q. When did you observe that number?

—. ——.

252 Q. The next morning down at Hope, when you were making the examination?
A. I don't know when I examined it.
Q. You didn't go back that evening, after this boy had his feet cut, to look at the car?
A. I knew it that day, after it ran over him.
Q. What called your attention to it?
A. We went back down there to look at the place where he got hurt, to see if we could find the place where he slipped.
Q. Did you find it?
A. No sir.
Q. You couldn't find it?
A. No sir.
Q. Who went with you to help you find it?
A. Mr. Jacques and Mr. Pierce.
Q. That this conductor Pierce?
A. Yes sir. I suppose Mr. Biard was there too.
Q. Did you examine the cars there?
A. Yes sir.
Q. Just state what examination you made?
A. I didn't make any examination at all of the cars.
Q. Who did?
A. Mr. Jacques, if anybody did.
Q. Did you see him making any?
A. Yes sir.
Q. What car did he examine?
A. 27442.
Q. What examination did he give it?
253 A. He said it was up to the standard.
Q. I mean, did you see what examination he made?
A. He looked over the car and inspected it.
Q. You don't know much about cars do you? You saw him raise that lever. Did you see him do anything else there?
A. I saw him look at the wheels under the car, at the grab irons; in fact, he looked all over it, as well as I remember.
Q. Did he make a report there then?
A. I don't know.
Q. That is all he did there then?
A. That is all I know that he did.
Q. Then, when were you called on to examine the cars again?
A. At Hope.
Q. You didn't find the number of any other cars there except this 27442?
A. No sir.

Q. At Hope you examined a couple of cars?
A. One car.
Q. What car?
A. 27442.
Q. Who was there to help you examine it?
A. Mr. Baker, Mr. Boils, Mr. Herring, Mr. Roberts and Mr. White.
Q. How come them all to go there and examine that car?
A. I was going down to the coal shed.
Q. What examination did you make of that car?
A. I just tried to pull the pin, to see if the knuckle would open.
Q. Did the other men do it?
254 A. Some of them did.
Q. Did it work?
A. Yes sir.
Q. Was there any engine there, or other cars?
A. Yes sir, there was an engine there.
Q. Did you couple the engine onto this car?
A. No sir.
Q. You didn't fix the coupling on the engine and back it back and see if it would work itself before you worked the lever?
A. Yes sir.
Q. Who else was there? Was Mr. Pierce there?
A. Yes sir.
Q. Did you see him work it?
A. I don't know.
Q. What is your judgment about that?
A. I don't know whether he worked it or not.
Q. Did anybody else do it?
A. Yes sir.
Q. How many do you think examined it?
A. I guess the whole bunch examined it.
Q. Pierce was there?
A. Yes sir.
Q. The engine wasn't coupled onto it though?
A. No sir.
Q. There were no other cars there?
A. Yes sir.
Q. Where were there any other cars?
A. The track was almost full.
255 Q. Wasn't this car coupled onto any other car?
A. It was cut on the end that Mr. Brown got hurt on when I went down in the yard.

Redirect examination.

By Mr. Klienschmidt:

Q. When you went down there, the others were already there?

Mr. Cruce: Objected to as leading.
The Court: Sustained.

Q. Did you go down there with the others or did they go there ahead of you?

A. No sir, I went up there and got my switch list and drifted down to the coal shed to do some work.

Q. When you got down there, who was there?

A. Mr. Baker was there and Mr. Boils and Mr. Herring.

Q. You wouldn't undertake to say what inspection they made before you got there?

A. No sir.

Q. You don't know about that?

A. No sir.

Q. But as far as your inspection went, the coupler showed up all right?

A. Yes sir.

(Witness excused.)

N. E. JACQUES, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

256 Direct examination by Mr. Klienschmidt:

Q. State your name?

A. N. E. Jacques.

Q. Where do you live, Mr. Jacques?

A. Ashdown.

Q. What is your occupation or business?

A. Inspector.

Q. For what road?

A. Frisco.

Q. What kind of inspector?

A. Car inspector.

Q. What are your duties in that particular?

A. Supposed to handle all interchange and all yard work, see that the cars are in good condition before leaving there.

Q. State whether or not that includes the condition of the appliances, coupling, etc.?

A. Yes sir.

Q. How long have you been in the railroad business?

A. About 24 years.

Q. In what capacities?

A. I have worked in the office, been round house inspector, worked building cars, and I have fired.

Q. State whether or not, during that time, you became familiar with the operation of trains?

A. Yes sir.

Q. And the different appliances that are used?

A. Yes sir.

Q. Coupling appliances?

A. Yes sir.

257 Q. On February 20, 1911, the day Mr. Brown was hurt, where were you working?

A. I was on the K. C. S. transfer.
Q. At Ashdown?
A. Yes sir.
Q. When did you first hear of the accident?
A. I saw the confusion up around the depot and walked out there, knew something was the matter from the moves the engine was making, and the noise; I knew something was the matter, so I walked up there.
Q. You knew Mr. Brown was run over?
A. Not until I got up there.
Q. Did you see Mr. Brown at that time?
A. I went in the caboose, yes sir, and saw him.
Q. Where was he?
A. He was lying on the caboose floor.
Q. Did you hear him talking any in there?
A. Somebody asked him how he got hurt, and I heard him say, it was in attempting to open the knuckle and he fell.
Q. Did he say anything about the knuckle wouldn't open?
A. No sir.
Q. State whether or not he made any statement about the condition of the appliances?
A. No sir.
Q. Made no complaint about that?
A. No sir, I didn't hear a word.
Q. Well, did you make any examination of those cars?
A. Yes sir.
258 Q. Do you remember the number of the cars you examined?
A. Yes sir.
Q. What are they?
A. C. St. P. M. & O., 27442, and Aclantic Coast Line car 29929.
Q. Where were those cars standing at the time you examined them?
A. On the east side of the passing track.
Q. Was anybody with you when you examined them?
A. Yes sir, the conductor and the K. C. S. inspector went down there with me.
Q. State whether or not it was part of your duties to make these examinations?
A. Yes sir, that is our instructions.
Q. Just state what you did with reference to the examination.
A. We went down there and inspected the safe appliances; that is, grab irons, couplers and any other defects the car might have, and found this was a practically new car.
Q. Which car was that?
A. 27442. Been rebuilt about a month, from the looks of it; had new couplers on it. They were exceptionally fine couplers, operating autimatically.
Q. What was the make of those couplers?
A. Latrobe.
Q. How did they operate?

A. Fine. They were automatic. That is, they fell open on lifting a lever.

Q. What did you operate the coupler with?

259 A. The pin lifter.

Q. Is that the lever that extends to the side of the car?

A. Yes sir, that is the lever that connects to the side of the car.

Q. Look at this, Defendants' Exhibit 3, Mr. Jacques, and state if that is a correct drawing of the Latrope couplers, such as this C. St. P. M. and P. car was connected with at that time?

A. Yes sir.

Q. Just explain to the jury, holding this so they will understand it, point out what is the knuckle, and explain to them how that opens when you operate the lever?

A. This is the coupler here; this is the knuckle; this lock in here, when raised there is that lock open. There is a piece on the bottom that, when it is raised to a certain point, strikes the tail of the knuckle and throws it open, and this locks here in two pieaces, and when this bottom——

Q. The lever is connected with this pin lifter right here?

A. Yes sir, it is connected on that, and on the tope and side of the car.

Q. When that is pulled, that comes up and throws this knuckle out and around?

A. Yes sir.

Q. Open this, so to speak, wide, so that the other coupler can go in there and take hold?

A. Yes sir.

Q. You say you made this inspection of the C. St. P. M. & O. car in this way?

260 A. Yes sir.

Q. Did you inspect the other car?

A. Yes sir.

Q. What was that car?

A. A. C. L., 29929.

Q. What was the coupler on that?

A. A. N. on the west side.

Q. What kind of levers did that have?

A. Continuous pin lifters, operated from either side.

Q. Ran clear across the car?

A. Yes sir.

Q. Did you inspect those?

A. Yes sir.

Q. How did they work?

A. Fine.

Q. State whether or not the knuckle would be thrown by the lever?

A. It is always automatic; you can't throw the lock without opening the knuckle.

Q. What is the proper way to operate this knuckle, in order to prepare them for coupling?

A. How do you mean?

Q. A brakeman wants to prepare the coupler to be coupled by impact?
A. Supposed to use the pin lifter.
Q. By standing off or on the track?
A. Off the track.
Q. Is that safe, when it is operated in that way?
A. Certainly.
261 Q. Now, could both of these couplers be operated in that way?
A. Yes sir.
Q. Did you make any—take any notice, or have occasion to observe where Mr. Brown was run over?
A. There was blood about twelve or fifteen feet from the switch point.
Q. Which way from the switch point?
A. East.
Q. The switch point is how far east of the switch frog?
A. It is opposite the switch frog.
Q. And this blood on the rail was fifteen feet east of that?
A. Yes sir, about twelve or fifteen feet; I never measured it.
Q. When you made this inspection, Mr. Jacques, about how far apart were the cars, the A. C. L. car and the C. St. P. M. & O. car?
A. I should judge about a hundred and fifty feet. The A. C. L., was on the road crossing and this car was nearly by the switch. I should judge it would be a hundred and fifty feet, may be a hundred and seventy-five; I don't know exactly.
Q. You say the St. Paul was almost at the switch?
A. Yes sir.
Q. And the other car was a hundred and fifty feet further east?
A. Yes sir.
262 Q. State, from your examination of these cars, whether there was anything the matter with these couplers or safety devices on either car?
A. No sir. This 27442 measured up to the standard safety appliances and the Atlantic Coast Line was the same way.
Q. That is, the standard prescribed by the Interstate Commerce commission?
A. Yes sir. The pin lifters measured the proper distance.

Cross-examination by A. C. Cruce:

Q. Now, Mr. Jacques, how long you say you have been working for the railroad?
A. 24 years.
Q. When you went up there, you asked Mr. Brown how it happened?
A. No, I was standing in there and somebody asked him.
Q. You say he threw open the knuckle, and fell?
A. Yes sir.
Q. You can open these knuckles by standing on the side?
A. Yes sir.
Q. You can stand on the track, at the end, and open them?

A. You can if you want to.

Q. And if the car is still, it is just as safe to stand there as it is on the side?

A. If the car is not moving, yes sir.

Q. But if the car is still, it is just as safe to stand between the tracks as it is out the outside?

A. Yes sir.

Q. Suppose there happens to be anything that the lever
263 wouldn't raise it, then you can take your hand and open the knuckle?

A. You can if the lever wouldn't raise it.

Q. I am not talking about this particular one; but if there should be anything the matter with the lever, if it should hang, and if the lever didn't raise it, you can open it with your hand?

A. If the lock sticks, you can open it with your hand.

Q. Can you open it at all if there is anything the matter with it?

A. Some of them can and some of them can't.

Mr. Klienschmidt: We object to this, if the court please.

Q. Could this one have been opened with the hand if there had been something the matter with the lever that it wouldn't open?

A. In a case of this kind, where they are automatic, if the lever won't raise them, I don't see how you can raise them.

Q. Couldn't open it with his hand?

A. If there had been something the matter with the lever, he could have raised the lock with his hand, and opened it, yes sir.

Q. Suppose that one of these automatic couplers, that there gets something the matter with one of the levers, there isn't anything to do to it then?

A. Our instructions are that——

Mr. Klienschmidt: We object.

Mr. Cruce: I will withdraw the question.

Q. Now, Mr. Jacques, you went down and determined what car went over Harry Brown?

A. Yes sir, the b-akeman pointed it out, and the conductor.
264 Q. You examined the knuckle?

A. Yes sir.

Q. And you went also and examined the knuckle on the other car that was some hundred and fifty feet away?

A. Yes sir. I have to examine the whole string.

Q. Did you examine them all?

A. Yes sir.

Q. And make a report?

A. Yes sir.

Q. Did you make a report on all of them?

A. No sir, not all of them; just the two of them.

Q. You satisfied yourself that day that these car couplers were in fine shape?

A. Yes sir.

Q. Did you have anybody there to help you except railroad men?

A. No sir.
Q. You knew they were in fine shape?
A. Yes sir.
Q. You examined them in a couple of days after?
A. No sir, they were examined.
Q. Weren't you there?
A. No sir.
Q. You were not down at Hope?
A. No sir.
Q. Did you make a report that evening?
A. Yes sir.
Q. As to the condition and what you found?
A. Yes sir.

Q. Now, this place that you found where the accident
265 happened, was some twelve or fifteen feet east of the switch?
A. Yes sir.

Q. You mean where the elevator switch ran in?
A. That is, the M. P. & G. connection.
Q. How could you tell?
A. There was blood on the side of the track.
Q. On the rail?
A. No sir, on the ground.
Q. Blood on the rail too?
A. I didn't see any blood on the rail.
Q. Who was there examining with you?
A. Mr. Pierce and Mr. Kelsey.
Q. Didn't you examine it by yourself?
A. No sir.
Q. Now, where was it you found this blood?
A. On the ground, on the south side of the track.
Q. South side of the rail?
A. Yes sir.
Q. How far was it from the rail?
A. I should judge about a foot and a half.
Q. How much blood did you find?
A. It was a pool about eight or ten inches square.
Q. And didn't find any blood on the rail?
A. No sir.
Q. Was there any more blood south of that little pool there?
A. I didn't see a bit; that is all I could find.

Q. Well, you looked for it?
266 A. No sir, I didn't look for it.
Q. You went down there with the conductor, didn't you?
A. Yes sir.
Q. Did he ask you to go or did you ask him to go?
A. I went down there, and he went down as a witness, and the K. C. S. Inspector.
Q. Who was the K. C. S. inspector?
A. Kelsey.
Q. Where is he?
A. He is bumming around over the country, and nobody knows where he is.

Q. How do you know that nobody knows where he is?
A. I have asked several people, and they don't know where he is.
Q. Why did you want to know?

Mr. Klienschmidt: We object to that.

A. I have worked with him several years.
Q. Now, as a matter of fact, wasn't there more blood on the rail than there was on the ground?
A. I didn't see any.
Q. Did you see any blood on the ground?
A. Yes sir.
Q. You could see the rail?
A. Yes sir.
Q. If there had been any blood on the rail, you think you would have seen it?
A. Yes sir, I think so.

(Witness excused.)

267 T. L. HERRING, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.
A. T. L. Herring.
Q. Where do you live?
A. Hope, Arkansas.
Q. What is your business?
A. Car man, car repairer.
Q. At Hope?
A. Yes sir, at Hope.
Q. What were you doing in February, 1911?
A. I was repairing cars.
Q. At Hope?
A. At Hope.
Q. How long had you been in that business?
A. About eighteen months.
Q. Do you remember having inspected some cars that came in about the 20th of February, 1911, in the presence of Mr. Pierce and Baker and Dan Godbold and some others?
A. I inspected all the cars that came in.
Q. Do you remember having inspected car C. St. P. M. & O. 27442?
A. Yes sir, on the 21st.
Q. 21st of February?
A. Yes sir.
Q. Where was the car when you inspected it?
A. On track number two of the L. & A. at Hope.
268 Q. Was it by itself or coupled up with a train?
A. Coupled up with the train.
Q. Do you know whether that was the train that came in from Ashdown the day before?

A. Yes sir.
Q. Had there been any change in that car since it came in?
A. No sir.
Q. State what you did?
A. On the 21st, the L. & A. man and myself inspected all the cars that came in, and we didn't find anything wrong with the car at all.
Q. Did you make any change in the coupler on that day?
A. No sir.
Q. Was it left just where it was?
A. Left just where it was.
Q. I will ask you if you made an inspection on the 22nd?
A. We did.
Q. Who was present at that time as far as you remember?
A. There were several present; Mr. Baker, Mr. Roberts, Mr. Chamberlain, Mr. Buel and Mr. White.
Q. Mr. Pierce there?
A. Yes sir.
Q. Dan Godbold?
A. Yes sir.
Q. What kind of an inspection did you make?
A. We took the engine out and cut the cars apart, and made an inspection of the coupler to see if it was in first class condition, which it was.
Q. What did you find the condition to be?
A. It was good; the condition of the coupler was good.
269 Q. Would the knuckles raise by operating the lever?
A. They would.
Q. From the outside of the car?
A. From the outside of the car.
Q. Did you inspect the A. C. L. car that was coupled onto the other one?
A. Yes sir.
Q. That was the one that was coupled onto the C. St. P. M. & O. Car?
A. Yes sir.
Q. Do you remember the number of that car?
A. 29929, I believe.
Q. What was the condition of the couplers on the A. C. L. car?
A. They were all right; in good shape.
Q. Did you work the levers on that car, throw the levers open?
A. Yes sir, we did.

Mr. Klienschmidt: If the court please, we would like to prepare this witness to show the jury how one of these couplers works.
The Court: Has he got a lever?
Mr. Klienschmidt: We have one of these couplers down on the track here, and would like to have the jury shown how that works, how the knuckle will work.
Mr. Cruce: You mean one of these two cars?
Mr. Klienschmidt: We have a car with the Latrope coupler on it.

The Court: You don't mean to say this coupler works
270 like that one?

Mr. Klienschmidt: No, just to show how the kind of coupler works.

The Court: If the jury don't understand it, and there is no objection by counsel, I have no objection.

Cross-examination by A. C. Cruce:

Q. Now, you examined these cars on the 21st?
A. Yes sir.
Q. How many were present there?
A. On the 21st, two of us.
Q. Then you examined them again on the 22nd?
A. Yes sir.
Q. What did you make a second examination for?
A. We made the second examination with Mr. Baker. He came down to examine the cars.
Q. How long did the cars remain there?
A. Just a few hours.
Q. What became of them?
A. The L. & A. took them.
Q. Where did they take them?
A. To Alexander, Louisiana.
Q. They were shipped there?
A. Yes sir. I don't say that car went there, but they started that way.
Q. You haven't seen it since?
A. No sir.
Q. What did you keep — there until the 22nd for?
A. Got orders to hold them.
Q. Where did these orders come from?
271 A. I couldn't tell you.
Q. Who did you get your orders from?
A. From my boss man.
Q. Who was he?
A. Mr. Boils.
Q. Who is he?
A. He is foreman of the yards at Hope.
Q. And he told you to hold them until the next day?
A. He didn't tell me. He told the L. & A. not to move them, which they did; they never moved the cars.
Q. When did these cars go up there?
A. The night of the 20th.
Q. When did you get orders to hold them there?
A. The next morning, I think it was.
Q. Had you hooked them up to send them on east?
A. No sir, they hadn't been bothered.
Q. You got orders to hold them until Mr. Baker came?
A. There he is; you can ask him.
Q. He is the claim agent of the Frisco?
A. Yes sir.

Q. He examined them?
A. Yes sir.
Q. And he got you to examine these knuckles on both cars?
A. Yes sir.
Q. What other examination did you make?
A. Not any that morning.
Q. How many cars were there?
A. I don't know.
Q. About how many cars you think were in that train?
272 A. I think there were eighteen or twenty may be in the bunch.
Q. Was that on the L. & A. train?
A. On the L. & A. tracks at the present.
Q. Whereabouts were those two cars in that train, about what part, near the front or the back?
A. I guess they were about eight or ten cars from the back end.
Q. How many of the cars in that train did you examine?
A. The whole train. We inspected the whole train on the morning of the 21st.
Q. Did you inspect the whole train again on the morning of the 22nd?
A. No sir, nothing only the two cars.
Q. Your attention wasn't especially attracted to these two cars until the 22nd, until Mr. Baker came?
A. Yes.
Q. And you examined the knuckles and saw that they worked?
A. Yes sir.
Q. Did Mr. Baker work them?
A. Yes sir.
Q. They lifted up all right in the lever?
A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. Now, with reference to the L. & A. road. You say these cars were delivered to that road?
A. Yes sir.
Q. Do you undertake to say where they went?
273 A. No sir.
Q. You don't know whether they were going to Louisiana, or to another point in Arkansas?
A. No sir.
Q. They were empty cars?
A. Yes sir.

Recross examination by A. C. Cruce:

Q. That L. & A. did run into Louisiana?
A. Yes sir.
Q. And they were their cars?
A. No sir, but they had them.

Q. When did you first see Harry Brown here after this injury?
A. I seen him in the St. Louis hospital.
Q. How long after the injury?
A. Well, I was there about the 18th of March, I believe.
Q. You had a talk with him about this?
A. I didn't have a talk with him until about the 28th or 30th, I guess.
Q. You did have a talk with him?
A. Yes, I talked with him while he was in the hospital.
Q. I will ask you if you didn't state to him there in the hospital that that coupler was out of fix?
A. No sir.

Redirect examination.

By Mr. Klienschmidt:

Q. You are positive about that are you?
A. Yes sir.

(Witness excused.)

274 J. E. ROBERTS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury.
A. J. E. Roberts.
Q. Where do you live?
A. Hope, Arkansas.
Q. What was your occupation in February, 1911?
A. Cashier of the freight office for the Frisco at Hope.
Q. Did you have occasion—did you happen to be present at the time the two cars were inspected there in the yards at Ashdown about February 22, 1911?
A. Yes sir.
Q. You remember who else was present?
A. Yes sir, Mr. Baker, Mr. Chamberlain, Mr. Pierce, Mr. Godbold, Mr. Boils, Mr. Herring and Mr. White.
Q. Just state what you did, what you saw done there, or what you did with reference to these couplers?
A. He tested them to work the lever, to see whether the knuckle would open.
Q. What was the result of that inspection?
A. It would fall open.
Q. Was that true both as to the C. St. P. M. & O. car and the A. C. L. car?
A. I don't remember about the A. C. L.
Q. Were you there when that was examined or not?
A. I don't remember, but I remember about the other car.
275 Q. What was the result of that inspection of that car?
A. Well, I tried the lever, it would fall open, the knuckle would, and I watched the others try it too.

Q. Do you know when those cars came in there?
A. They came in there—I think they stayed there all the day previous to the day we tried them; I think they came in the night before.
Q. Were they still coupled up with the train they came in with?
A. Yes sir.

Cross-examination by A. C. Cruce:

Q. Let's get the names of those that were there. There was Baker and Pierce?
A. Baker, Pierce, Chamberlain——
Q. Is he a railroad man?
A. Engineer.
Q. And who else?
A. Mr. White.
Q. Who was White?
A. He was a clerk in the office.
Q. Who else?
A. Mr. Boils.
Q. Who is he?
A. He is yard foreman.
Q. Who else?
A. Mr. Herring, the car repairer.
Q. Who else?
276 A. Godbold.
Q. They were all there?
A. Yes sir.
Q. Now, that was the second day after the cars came in. The cars came in on the evening of the 20th, did they?
A. The night of the 20th.
Q. What were they held over there until the 22nd for?
A. I really don't know. I don't think I knew anything about it until I was asked to go around over to the inspection.
Q. Who asked you to go around?
A. Mr. Baker.
Q. Does anybody live in that town except the railroad employes? How big a town is Hope?
A. It is a pretty good town.
Q. Has it got a hundred people or a thousand?
A. The last official census gave it 3,750 I think.
Q. Did you have anybody there to help inspect that car except railroad men?
A. I think all that I remember were railroad men.
Q. How many cars were in that train that you inspected that day?
A. I don't know.
Q. What would be your judgment, Mr. Roberts?
A. I couldn't say. There were several. He had the engine to come up and cut the cars loose to get this car in the clear.
Q. Cut loose from both ends?

A. Yes sir, my recollection is that it was.

277 Q. And you examined—What examination did you mak of that car?

A. Just watched the other boys take hold of the lever and jerk and the knuckle would fall open.

Q. That is all the examination they made?

A. That is all I made, yes sir.

Q. What would prevent that lever, from the outside, from wor ing, from lifting—What could happen to it that would prevent from opening the knuckle when you would try to raise it?

A. I don't know.

Q. You don't know what condition it was in when it left Ash down?

A. No sir.

Q. And you don't know why it had been left there up until th 22nd?

A. I think it was held for examination.

Q. What became of it after that?

A. I don't know.

Q. What company did it belong to?

A. C. St. P. M. & *P.*

Q. Do you know what track it left on, if it did leave there?

A. No, I don't.

Q. Do you remember what number it was?

A. 27442, I think.

Q. How long has it been since you made this examination?

A. February, 1911.

Q. Nearly two years?

A. Yes sir.

(Witness excused.)

278 D. M. BALDWIN, called as a witness on the part of the de fendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. State your name to the court and jury, please.

A. D. M. Baldwin.

Q. Where do you live, Mr. Baldwin?

A. I live at Garvin.

Q. Garvin, Oklahoma?

A. Yes sir.

Q. What is your occupation?

A. Well, I have been working for the Frisco, section foreman.

Q. Where were you employed in February, 1911?

A. At Ashdown.

Q. As section foreman?

A. Yes sir.

Q. Do you remember the occasion of Harry Brown being hur there on that date?

A. Yes sir, I remember it.

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Q. You didn't see the accident, did you?
A. No sir.
Q. How long after the accident was it that you heard about it?
A. About forty-five minutes.
Q. Did you go up to the scene of the accident?
A. Not until afternoon. I passed by it as I went to dinner.
Q. But in the afternoon you went up there?
A. Yes sir, I had a message from the road master to go up there.
279 Q. Did you make an examination for the purpose of determining where he had been run over?
A. Yes sir.
Q. What did you find?
A. I found a little bit of blood on the rail, and also some on the ground.
Q. Where was that?
A. It was about ten and a half feet east of the switch point.
Q. On which rail, the north of south rail?
A. On the south rail.
Q. Was that the only place you found blood or indications that he had been run over?
A. Yes sir.
Q. Did you make the actual measurement of that or just guess at it?
A. I measured it.

Cross-examination by A. C. Cruce:

Q. How far did you say it was?
A. Ten and a half feet from the switch point.
Q. Now, what day was that?
A. On the 20th day of February, 1911.
Q. What time in the day?
A. About one thirty, when I measured the place.
Q. Where were you when you got the information, or the instructions?
A. I was at work up on the K. C. S. transfer.
Q. There on that same day?
280 A. Yes sir.
Q. And when you went down there, did you find and cars on the track?
A. No sir, there were no cars on the track.
Q. Was this blood on the main track or passing track?
A. Passing track.
Q. Passing track or spur track?
A. Passing track.
Q. And it was ten and a half feet?
A. Ten and a half feet from the switch point.
Q. There is a crossing there, just west of it?
A. East of it.
Q. East of it? I mean public crossing.
A. Well, I don't know just exactly the distance to the crossing.

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Q. Did you measure that?
A. No sir.
Q. Why didn't you measure it?
A. I didn't think of it.
Q. Why did it occur to you to measure this to the switch point?
A. I had instructions to.
Q. Who told you to?
A. Mr. Baker.
Q. Mr. Baker told you about one thirty in the afternoon of the day of this accident, he told you to find how far east that was of the switch point?
A. No sir, Mr. Baker wasn't with me. I didn't measure it at that time; I didn't make these measurements until after-
281 ward.
Q. When did you measure it?
A. It was several days afterwards. I put a mark on the rail where it occurred.
Q. What mark did you put on the rail?
A. I put a chalk mark on it.
Q. Wouldn't the blood mark it?
A. Yes, but if it rained, it would wash the blood off, and Mr. Fountain instructed me to designate the exact spot.
Q. Wasn't there some blood on the ground?
A. Yes, but it didn't stay there.
Q. How long did it stay there?
A. Just a short time.
Q. How long?
A. I don't know exactly how long.
Q. Had the blood washed off when Baker sent you there to measure it?
A. Yes sir, when Mr. Baker came down there himself, the blood was gone.
Q. How many days was that after the accident?
A. I don't remember.
Q. About how long?
A. I wouldn't say; it was quite a while.
Q. A week?
A. Yes, it was more than a week.
Q. But you do know that Mr. Baker—Harry was still in the hospital at St. Louis then, wasn't he?
A. I don't know.
Q. Was it a month after the accident when Baker came
282 down there and told you to measure it?
A. No sir, it wasn't that long.
Q. How long?
A. Something like three weeks.
Q. Where did you put that chalk mark?
A. On the base of the rail.
Q. It is there yet, isn't it?
A. I don't know.
Q. When did you last look to see?

A. I haven't been there in sometime.
Q. The blood was all gone when you went there?
A. Yes sir.
Q. And it was exactly ten and a half feet to the switch point?
A. Yes sir.
Q. Who was it sent you up there to make that designation?
A. The road master, John Lagdon.
Q. Where is he now?
A. At Frances, Oklahoma.
Q. Did he tell you to make the chalk mark?
A. He told me to locate the exact spot and mark it.
Q. Did he tell you to make a chalk mark?
A. No sir.
Q. How came you to carry the chalk?
A. I carry it all the time when I am at work.
Q. Where was this road master that told you to do that?
A. He was at Hugo then; he wired me to go and do this.
Q. Did you find anything there?
A. No sir, nothing only a few cinders.
283 Q. Did you make a report to him?
A. Yes sir.
Q. Did you tell him you had made a chalk mark there?
A. No sir.
Q. Did you tell him you found blood there?
A. No sir.
Q. You didn't tell him how you designated it?
A. No sir.
Q. It didn't occur to you to measure it. When Baker came down there and wanted you to measure from where this chalk mark was up to this switch point, did he measure too?
A. Yes sir, I think so.
Q. Did he tell you to measure back to the crossing east?
A. No sir.
Q. Is there a crossing there?
A. Yes sir, there is a small crossing.
Q. You didn't measure to that?
A. No sir.
Q. There were no cars there?
A. No sir.
Q. Nor on the main track?
A. No sir.

(Witness excused.)

C. B. BURK, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Klienschmidt:

284 Q. State your name to the court and jury.
A. C. B. Burk.
Q. Where do you live?

A. I live at Hugo.
Q. Where were you living in February, 1911?
A. Living in Hugo.
Q. What were you doing?
A. Brakeman for the railroad.
Q. For the Frisco?
A. Yes sir.
Q. Were you at Hope, Arkansas, the day they made an inspection of the two cars, one of which was said to have run over Harry Brown?
A. I was there when they inspected one.
Q. Which one did they inspect while you were there?
A. I believe it was C. St. P. M. & O.
Q. Were several others present at that time, were there?
A. Yes sir.
Q. Just tell the court and jury what you did, what you ascertained at that time?
A. I started through the yards, and Mr. Baker, or someone, called me to come down there, and I walked down, and they were looking at the car, and examined it.
Q. What did you do?
A. I stood there and watched them work the knuckles, to see whether it was an automatic*al* coupler or not.
Q. Was it an automatic coupler?
A. Yes sir.
Q. Would it operate the lever?
285 A. Yes sir.
Q. When they raised the lever would it throw the knuckle open?
A. Yes sir.
Q. Did you try it yourself?
A. No sir.
Q. You watched the others do it?
A. Yes sir.

Cross-examination by A. C. Cruce:

Q. When was that, Mr. Burk?
A. It was sometime in February.
Q. That was the time Mr. Baker was there?
A. Yes sir.
Q. How many cars did you examine?
A. I just examined one.
Q. How many did the others examine? There were several cars there, weren't there?
A. They only examined one while I was there.
Q. Was Mr. Pierce there?
A. Yes sir.
Q. Did you see him examine it?
A. Yes.
Q. Isn't it a fact that there were just two cars standing there, and

Mr. Pierce had them cut apart, and you pushed them back together, and then separated again?

A. Not while I was there.

Q. That happened?

A. Not while I was there.

Q. They asked you to come there to be a witness?

286 A. Yes sir.

Q. You saw Pierce examine it while you were there?

A. Yes sir.

Q. What did he do?

A. As well as I remember now, I believe he operated it.

Q. How many cars were there?

A. There was only the one.

Q. How far was it off to another car?

A. I suppose it was about a car length; may be two car-lengths.

Q. You don't know where these cars came from?

A. No sir.

Q. You hadn't seen them before?

A. No sir.

Q. You don't know whether that is the car that ran over Harry or not?

A. No sir, only what I was told; he said it was the one.

Q. I asked you what you knew?

A. No sir, I don't know.

Q. Well, that car there didn't work good, the lever, did it?

A. Well, it worked.

Q. It didn't work good, did it?

A. I didn't try it myself; I couldn't say.

Q. Couldn't you tell—Didn't you tell Mr. Brown down at the hotel this morning that that lever didn't work good there?

A. No sir, I don't remember telling him that.

Q. Did you have a talk with him this morning at the Whittington?

A. I have talked with him every time I would see him.

287 Q. Refresh your recollection and see if you didn't tell him this morning at the Whittington Hotel, that that lever, while it worked, it didn't work easy?

A. No sir, I don't think so.

Q. Did it work easy?

A. They don't any of them work easy; you have to jerk them.

Q. Did they jerk this one?

A. Yes sir.

Q. They would have to make a hard jerk?

A. Yes sir.

Q. And sometimes it wouldn't open, and they would have to jerk harder? Didn't some of them have to make the second motion to open it?

A. No sir.

Q. It did have to be jerked?

A. Yes sir.

Redirect examination.

By Mr. Klienschmidt:

Q. These levers all work by a quick movement?
A. Yes sir.

Recross-examination.

By A. C. Cruce:

Q. Are you a brakeman?
A. Yes sir.
Q. Now, what kind of a coupler was this they had on this car?
A. Latrobe, I believe.
Q. Do they work easy all the time, or sometimes do you have to take your hand to help open it?

Mr. Klienschmidt: That is objected to as irrelevant, incom-
288 petent and immaterial, and improper cross examination.
The Court: Sustained.
Mr. Cruce: We will make him our witness.
Mr. Klienschmidt: I object to them breaking into our case.

Q. I will ask you whether or not these Latrobe car couplers do work easily all the time, open without having to take your hand to help open them up?

Mr. Klienschmidt: I object to that as leading and suggestive; irrelevant, incompetent and immaterial, and not pertaining to any issue in this case, and not confined to the coupler which they allege is defective, but referring to a class in general, and not asked about this coupler.
The Court: Sustained.

(Witness excused.)

Mr. Klienschmidt: We want to offer in evidence defendant's exhibit No. 1.
Defendant's exhibit No. 1, being the application for employment identified by the plaintiff herein, appears in the words and figures following, to-wit:
(A true and correct copy of defendant's exhibit No. 1, appears in this record on page 44 hereof.)
Mr. Klienschmidt: We offer defendant's exhibit No. 3.
Defendant's exhibit No. 3, being a drawing of the Latrobe coupler, appears as follows, to-wit:

(Here follows drawing marked page 288½.)

289 Mr. Klienschmidt: We offer defendant's exhibit No. 2, which is referred to in the answer on page 1 and on page 6, being rules No. 630, 31, 32, 34, 36 and 37.

Defendant's exhibit No. 2 appears in the words and figures following, to-wit:

Precautionery and Personal.

630. All persons entering into or remaining in the service of this company, are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

631. Each employe is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows. Employes of every rank and grade are warned to see for themselves before using them, that the rolling stock, machinery or tools which they are required to use, are in safe condition, or that they are so put before using.

632. The company does not require or expect its employes
290 to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that the shall take time and use the means necessary to, in all cases, do their duty in safety.

634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it dangerous to expose the hands, arms or persons of those engaged in coupling cars, all employes will be expected to use the utmost car- in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

636. It is alike dangerous to assume that signals given to the Engineman or Fireman have been seen, and if seen will be obeyed—when obedience to those signals on the part of the Engineman or Fireman is essential to the safety of an employe in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position—otherwise, without such knowledge, he assumes all risks of danger arising from any misunderstanding or disregard of signals.

637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed, or to go between cars in motion to uncouple them, or to follow other dangerous practices.

291 T. L. HERRING, recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. Klienschmidt:

Q. About this L. & A. they asked you about these cars going down on the L. & A., I believe. How far does the L. & A. run in the state of Arkansas, you remember?
A. About sixty miles, something near that.
Q. Are there stations in Arkansas south of Hope?
A. Yes sir.
Q. You don't know whether these cars, after the L. & A. took them, were going to a station in Arkansas or going to Louisiana?
A. No sir.

Cross-examination by A. C. Cruce:

Q. Is there any way to tell where those cars went to?
A. Yes sir.
Q. How would you tell?
A. You could hunt up the car records of the routing and tell where they were routed, I suppose.

(Witness excused.)
And here the defendant rested its case.

Whereupon, the plaintiff offered and introduced evidence in Rebuttal as follows:

Rebuttal Evidence.

292 FRANK ROBINSON, called as a witness for the plaintiff in rebuttal, having been duly sworn, testified as follows:

Direct examination by A. C. Cruce:

Q. What is your name?
A. Frank Robinson.
Q. What is your business?
A. Brakeman.
Q. Who for?
A. The Frisco.
Q. When did you come here? I mean, when did you come to town, with reference to this trial? When were you summoned here as a witness?
A. I came over here the night of the 8th.
Q. Mr. Robinson, where were you on the day that Harry Brown received the injury to his feet?
A. I was in Ashdown.
Q. Where were you at the time of the accident?
A. I was on the engine.
Q. What engine?
A. 804.

Q. Was that the engine that was running the cars that run over him?
A. Yes sir.
Q. Who else was on that engine?
A. Mr. Chamberlain and Mr. Baird.
Q. You mean Engineer Chamberlain?
A. Yes sir.
Q. How long had you been on the engine?
293 A. I don't remember the time; some five or six or ten minutes, I suppose; may be fifteen.
Q. Did you speak to Mr. Chamberlain when you went on?
A. I think so.
Q. Now, Mr. Robinson, where were you just awhile before you went on the engine?
A. I was around there in the yards, around in that part.
Q. Do you know Mr. Godbold?
A. Yes sir.
Q. Did you see him giving signals to Chamberlain there, while that switching was going on?
A. I seen him before I got on the engine, down somewhere about the mill track, down there, give some kind of a signal.
Q. Was it a go ahead or back up signal?
A. I don't remember; I wouldn't be positive what kind of a signal it was.
Q. Which direction was Mr. Chamberlain looking at the time he started his *track* backing when it ran over Harry?
A. He was looking east.
Q. Was that the direction Harry was?
A. Yes sir.

Cross-examination by Mr. Klienschmidt:

Q. On what track were the engine and cars when you saw Godbold give some sort of a signal?
A. I seen Godbold in the space between cars on the passing track; he was over on the mill track there somewhere.
Q. On the mill track?
294 A. Yes, on the track that runs down to the stave factory; it has been so long I don't remember now.
Q. Was that the oil mill track or the stave mill track?
A. Stave mill track.
Q. Was that while this cut of cars were going back on that track?
A. I think it was when they were figuring on backing up, if I remember right.
Q. Figuring on backing up on the stave mill track or the passing track?
A. I don't know which way they were figuring on going; I wasn't interested in the work, and I didn't pay much attention to it.
Q. Now, you say you got on the engine. You got on the fireman's side?
A. Yes sir.

Q. No, lineteen. Were cars, engine and machinery inspected after the accident?
A. That is the one.
Q. And your answer, what is that, the answer?
A. Yes, inspector Jacques; it says by him.
Q. Your answer is inspector Jacques?
A. Yes.
Q. Look at paragraph 11, and see if that doesn't read this way: Give full particulars of cause of accident. State fully. Brakeman Brown stepped in front of car to open knuckle, slipped and fell; wheels passed over his feet. I was not an eye witness? You made that report?
A. Yes sir.
Q. That was a part of your report at the time?
A. Yes sir.

Cross-examination by Mr. Klienschmidt:

Q. Now, with reference to the statement in this report, as to giving full particulars and cause of the accident. You don't know that that is the way the accident happened; that is the way it was told to you?
A. Yes sir.
Q. By whom? By Brown?
A. No, Mr. Brown didn't say that he stepped in front to
299 open the knuckle, but Mr. Godbold and the other brakemen said he was trying to open the knuckle, or crossed over to open the knuckle; that was his idea, in going in front of the car. I didn't get to talk to Mr. Brown as to how it happened, and he didn't say.
Q. It had been raining there that day, hadn't it?

Mr. Cruce: Objected to as leading.

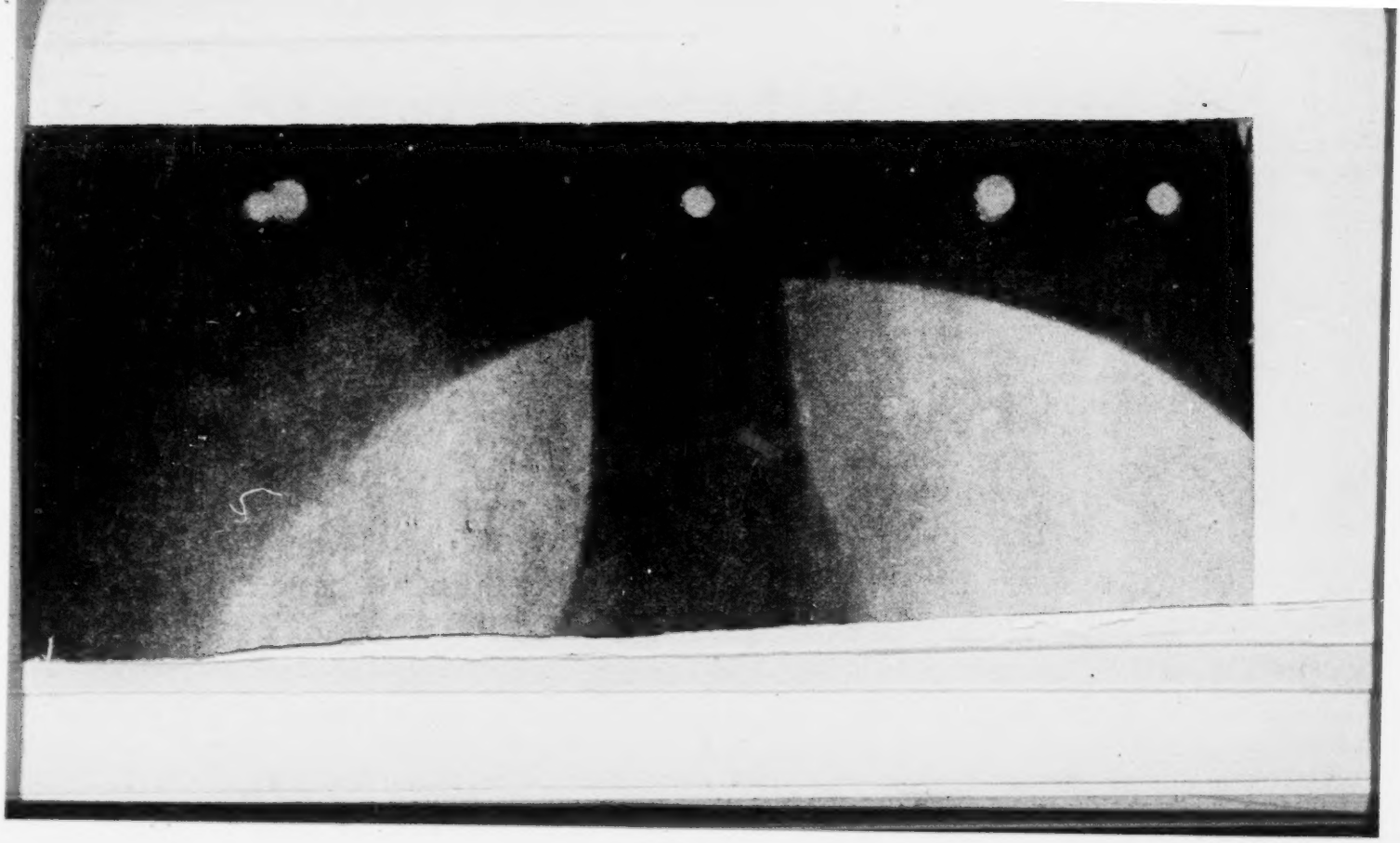
Q. Had it been raining there or not?
A. No, I don't remember it; no, I don't think it had been.

(Witness excused.)

HARRY A. BROWN, recalled as a witness in behalf of the plaintiff, testifie- as follows:

Direct examination by Mr. A. C. Cruce:

Q. Did you have a conversation this morning with this brakeman, Burk, at the Whittington Hotel?
A. Yes sir.
Q. I will ask you if he stated to you that that car coupler was defective?
A. Yes sir. He just made the remark, said it wouldn't work good.
Q. Did you see—What was the name of the witness that came to see you while you were in the hospital at St. Louis?

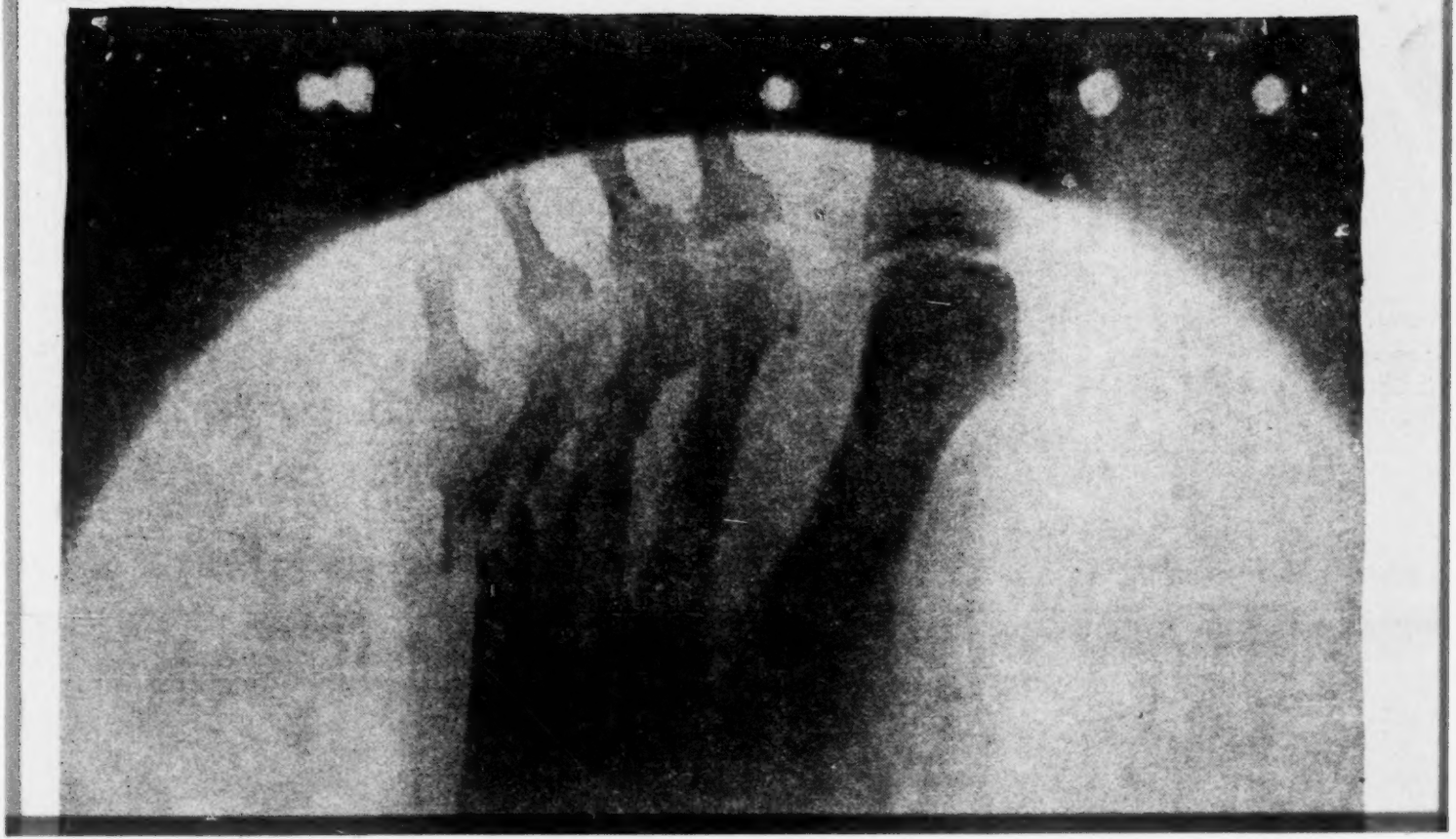


ROAD COMPANY VS.

300a H Or [illegible]

No 399.
St L & SF RR
v
Brown
} 300 a.

Defendants Ex. 5
Page 260



No 399
T. L & S F R R
v.
Brown
} ¢ 300 b.

Defendants Ex 6
Page No.

A. I couldn't recollect his name, or couldn't until I heard it here; I think it is Herring.

Q. How long had you been in the hospital when he was
300 there, do you know?

A. It seems to me about thirty days.

Q. I will ask you if he stated to you there that he had examined that car that hurt you, and it wouldn't work, or was defective?

A. No sir. He made the remark something to the effect like, broke or that it wouldn't fall open on application of the lever.

Cross-examination by Mr. Klienschmidt:

Q. You have been talking to all the witnesses since you have been here in town, haven't you, Mr. Brown, trying to get them to testify in your favor?

A. No sir.

Q. Those the only two you have talked to?

A. I have never talked to Herring since he has been here.

Q. Is Burk the only one you have talked to?

A. Yes sir.

Q. Only one?

A. Yes sir.

(Witness excused.)

And here the plaintiff rested his case in rebuttal.

Mr. Klienschmidt: Here are these exhibits offered before as part of our case, numbers 5 and 6.

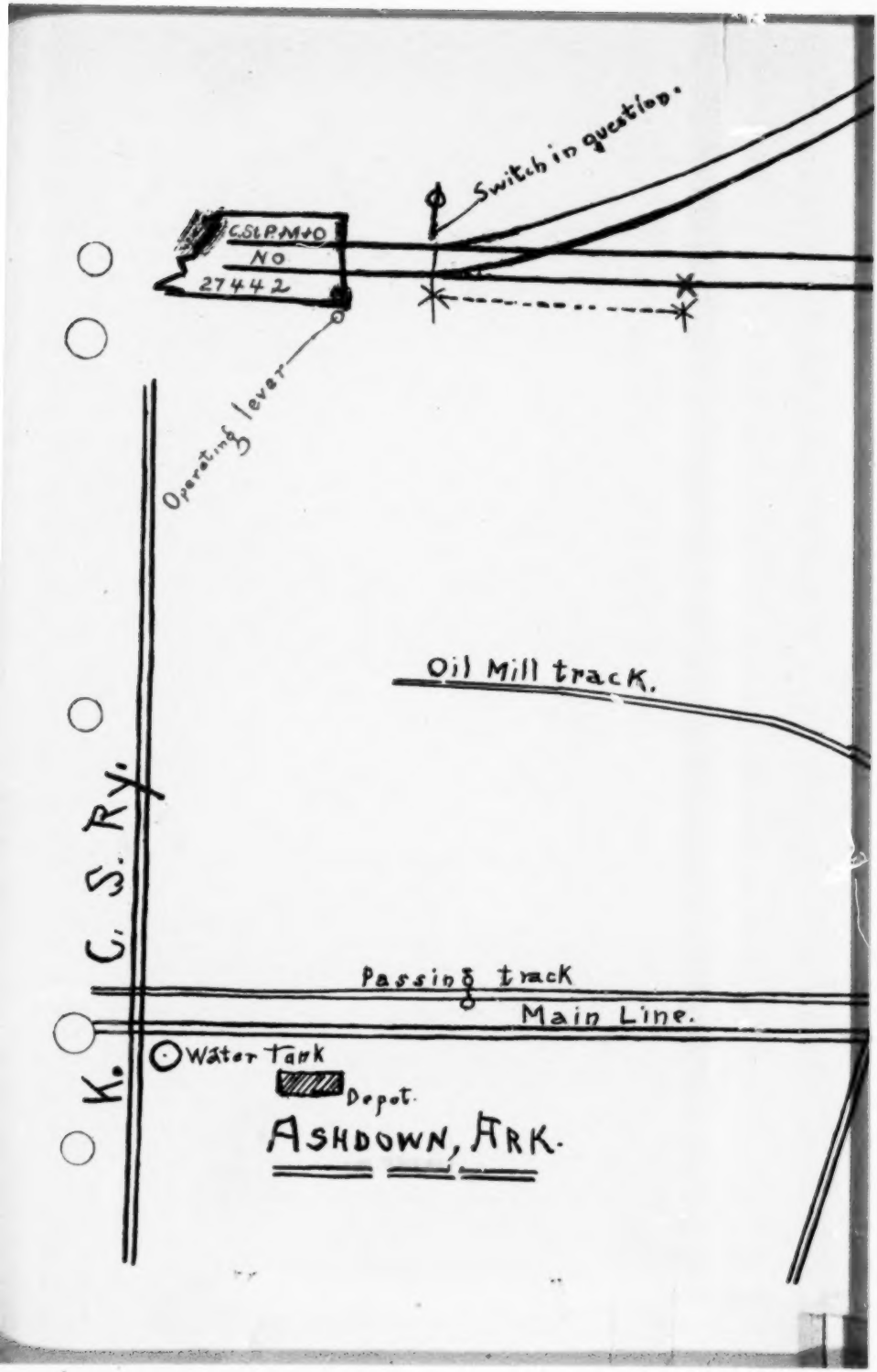
Defendant's exhibit- 5 and 6 are the shadowgraphs of the plaintiff's feet, and are as follows, to-wit:

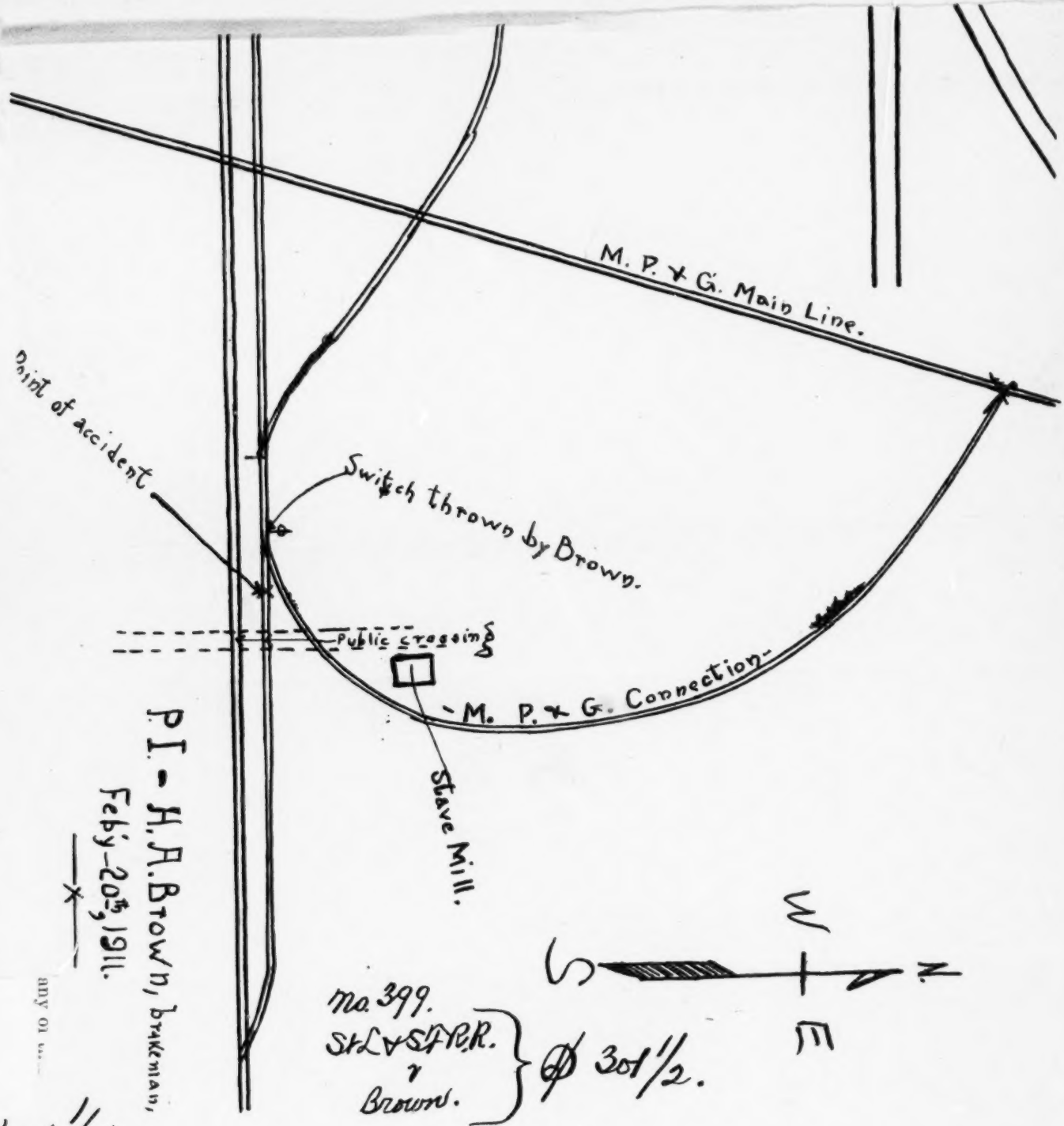
(Here follow photographs marked pages 300*a* and 300*b*.)

301 Mr. Klienschmidt: We offer in evidence plaintiff's exhibit A.

Plaintiff's exhibit A appears in the words and figures, and the drawing as follows, to-wit:

(Here follows drawing marked page 301½.)


Switch in question.
C.S.L.P.M.&O
NO
27442
Operating lever
Oil Mill track.
C. S. Ry.
K.
Passing track
Main Line.
Water Tank
Depot.
ASHDOWN, ARK.



P.I. - H. A. Brown, brakeman,
Feby-20th, 1911.

No. 399.
St L & SF R.R.
v
Brown.

Ø 301/2.

301/2.

302 The Court (speaking to the jury): Gentlemen, it is agreed that you can go to the depot and see some car down there. You go with the bailiff and go right away down there. You will look at the operation of that matter for one purpose, only, and whether it works good or not is nothing to you; you simply go there to see the method of its operation. The object is, not that this car out there will prove to you that the other car complained of was in a good condition or bad condition, but simply to observe the methods that these couplings are made and used for.

And here the plaintiff rested his case.

And here the defendant rested its case.

And thereupon, the usual hour for adjourning for the day, having arrived, Court was adjourned to the 11th day of December, 1912, at 8 o'clock, A. M.

And afterwards, to-wit, on the 11th day of December, 1912, the hearing of this cause was resumed, the appearances being the same as on the 10th day of December, and at which time the following proceedings were had, to-wit:

Mr. W. I. Cruce: If the Court please we would like to re-open the case for the purpose of putting Harry A. Brown back on the stand.

Mr. Klienschmidt: If the Court please, we object to that for the reason that plaintiff announced the case was closed on yesterday afternoon, and relying upon this, the defendant excused *his* witnesses, all of whom are non-residents of the County, and have left the County, and no further evidence should be allowed at this time.

303 The Court: Overruled.

To which action of the Court, the defendant then and there excepted.

HARRY A. BROWN, recalled as a witness on the part of the plaintiff, testified as follows:

Direct examination by W. I. Cruce:

Q. Mr. Brown, on yesterday Mr. Hohnsbeen, I believe it was, testified that he had cautioned you a time or *to* about your carelessness, and that the conductor had once turned you in. Tell the jury whether that is so or not?

A. Mr. Hohnsbeen at no time, only when I stood the examination, never cautioned me, and I was never in the office, and if I was ever turned in, I never knew anything about it.

Q. You heard the testimony of three or four witnesses yesterday who testified, two witnesses who testified that, soon after this accident, or some of them testified before you were taken up off of the ground, and some after you were put in the caboose—you heard their testimony, did you? Testified some you said you slipped; some that you said you were opening the knuckles and slipped and fell. Did you make such statements as that to any of these witnesses?

A. No sir, I don't think I did. I don't see how I could have made them, because it wasn't true.

Q. What was your condition at that time?

A. I was suffering very bad; it was right after I was hurt.

304 Cross-examination by Mr. Klienschmidt:

By Mr. Klienschmidt:

Q. I understand you to say that Mr. Hohnsbeen never gave you any discipline, that is, gave you any caution, or called your attention to any violation of the rules of the company?

A. Yes sir, he did once by letter, but never in his office. He notified me about having one demerit.

Q. When was that?

A. I couldn't remember the day, but I can explain to you what it was for.

Q. Just look at this letter, identified as defendant's exhibit 8, and state if that letter is in your handwriting?

A. Yes sir.

Q. You wrote that, did you?

A. Yes sir.

Q. Read it to the jury, please.

A. Hugo, Oklahoma, 10th month, 6th day——

Q. Of what year?

A. The year isn't on there. Mr. F. D. Hohnsbeen, Assistant Superintendent. Dead Sir: I must express my regrets for running through switch. It is true I might have been excited, but wasn't altogether my fault. However, I will try to keep it from happening again. Respectfully. H. A. Brown.

(Witness excused.)

And here the plaintiff rested his case.

And here the defendant rested its case.

305 And the above and foregoing was all the evidence offered and all the evidence introduced at the trial of said cause.

And afterwards, to-wit, on said 11th day of December, 1912, the defendant filed in said Court its requested instructions, which requested instructions of the defendant appear in the words and figures following, to-wit:

306 & 307 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Request for Instructions.

Comes now said defendant and hereby requests the court to give to the jury the following instructions in writing, numbered from 1 to 28, inclusive.

R. A. KLIENSCHMIDT,
J. H. GRANT,
Attorneys for Defendant.

1.

You are instructed to return a verdict in favor of the defendant.
Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

* * * * * * *

308 6.

You are instructed that plaintiff has failed to establish by any competent evidence that at the time of the alleged injuries he was employed by the defendant in interstate commerce.
Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

12.

If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L. p. 66, which is as follows:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe."

The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in pro-

portion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language "in proportion" occurring in this statute. The word proportion is a general word with a number of different meanings.

309 When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words "in proportion" as used in this statute to mean such a part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

But, if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence,

310–316 then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict.

Refused. Def't excepts.

S. H. RUSSELL, *Judge.*

* * * * * * *

317 On the back of said requested instructions appears the following endorsement: Filed in open Court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

318 And the Court, after hearing the instructions numbered 1 2 5 6 12 14 15 16 17 18 19 21 22 23 24 26 and 28, requested by the defendant, and each of said instructions, refused to give said instructions numbered 1, 2, 5, 6, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, and 28, requested by the defendant, or either of said instructions, to which action of the Court in refusing to give said requested instructions numbered 1, 2, 5, 6, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26 and 28, and each of said instructions, separately and collectively, the defendant then and there excepted, and its exceptions were by the Court allowed.

319 And thereupon, at the proper time and in the proper manner, the Court, on its own Motion, delivered its instructions to the jury in this cause, which instructions of the court appear in the words and figures following, to-wit:

320 STATE OF OKLAHOMA,
Carter County:

In District Court.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Instructions of the Court.

I.

Gentlemen of the Jury: Plaintiff alleges that on February 20, 1911, he was employed by the defendant as extra brakeman on a train destined for Hugo, Oklahoma, and that while at the *time* of Ashdown in the state of Arkansas, he sustained certain injuries by the negligence of the defendant and its servants. He alleges that while standing on the track between the rails and while about to arrange the knuckle on the coupler of a car so as to prepare it for coupling with another car, the engineer on the train in question, without warning or notice to plaintiff, backed the engine and cars, throwing plaintiff across the rail and inflicting the injuries complained of. He further alleges that the couplers on both cars which plaintiff was arranging to couple, were defective, in that they would not couple automatically by impact, as required by Act of Congress of March 2, 1893, as extended and amended by Act of Congress of April 22, 1908, and that it was necessary for plaintiff to go in between the ends of the cars and arrange same so that they
321 would couple by impact.

The defendant answers, denying the allegations of plaintiff's petition, and specifically denying that the plaintiff was engaged in operating a train between Hugo, Oklahoma, and Ashdown, Arkansas, and denying that the plaintiff was engaged in the handling of interstate commerce, or that the train in question was engaged in interstate commerce. Defendant furrther denies that the couplers or either of them on the cars in question were defective so that they would not couple automatically by impact, and denies that the cars, or either of the-, were not equipped with couplers and appliances in compliance with the acts of Congress.

For further *defendant*, defendant alleges that it was not necessary for plaintiff to go between the cars to prepare for coupling, and that he was guilty of negligence in so doing, and that he would have sustained no*n* injury if he had been in the exercise of due care. Defendant further alleges that plaintiff violated certain rules promulgated by the defendant for the guidance of the employes, and also violated the

terms of the written contract entered into between the plaintiff and the defendant. It is further alleged that plaintiff assumed the risk of the dangers incident to his employment, and that one of those risks was the danger in making couplings, or in working on or about tracks and trains, and that for this reason, plaintiff is not entitled to recover.

The plaintiff, for reply, denies generally the allegations of defendant's answer, except as to those specifically admitted. Plaintiff admits signing the contract, exhibit "1," but avers that he is not bound by the provisions thereof, and further avers that the defendant has by its acts waived the right to enforce such contract.

322

II.

You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893.

III.

You are instructed that the fact that the defendant is a railroad corporation will not justify you in giving to the testimony of defendant's witnesses any less weight than you would otherwise give to it; and you should not permit any feelings of bias, prejudice or sympathy in any degree to influence your verdict, and your verdict should be based entirely upon the law and the evidence.

IV.

You are instructed that the mere fact that the plaintiff was injured while in the employ of the defendant raises no presumption of negligence on the part of the defendant. The mere happening of an accident to an employe is not sufficient to raise the inference that the employer has failed to discharge his duty to such employe.

V.

You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement of transportation of a car or cars, of freight, destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in the other cars of the train, that was to be transported between interstate points, but plaintiff must show by a fair preponderance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the Act of Congress of April 22, 1908, would apply in this case.

323

If on the other hand, plaintiff has not established that he was so employed in interstate commerce at the time of the injury, then the Act of Congress of April 22, 1908, would not apply in this case.

VI.

You are instructed that by "contributory negligence" is meant the failure or omission of the plaintiff to exercise that degree of care for his safety which an ordinarily prudent man would exercise under the circumstances, and in this connection you are instructed that if you find that the rule or rules set up in defendant's answer were in force at the time of plaintiff's injury, it was the duty of plaintiff to obey the same and, if his injuries were due to or contributed to by his disobedience of said rules, or any of them, that would constitute contributory negligence.

VII.

You are further instructed that if the plaintiff gave the en-
324 gineer on defendant's train a signal to back up, the engineer had a right to obey such signal and had a right to assume that the plaintiff would not be on the track in front of such cars, and it would not be negligence for him to back such car.

VIII.

You are instructed that the fact that the plaintiff, at the time of signing the contract attached to defendant's answer as exhibit "A," did not read same or know the contents thereof, is immaterial and would not relieve the plaintiff from compliance with the terms of said contract.

IX.

The burden of proof is upon the plaintiff in this case to establish by a fair preponderance of the evidence the allegations upon which he relies for a recovery. You are the judges of the weight of the testimony and the credibility of the witnesses, and you should give the testimony introduced such weight as you think it is entitled to receive.

Excepted to by defendant.

S. H. RUSSELL, *Judge.*

X.

If you find by a preponderance of the evidence that at the time of the injury, that the plaintiff was assisting in making up a train for the defendant that was to be taken upon defendant's line of railway from Ashdown, Arkansas to the State of Oklahoma, then in such case the defendant at the time was actually engaging in interstate commerce.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XI.

If you find that at the time of the injury that plaintiff was assisting defendant in making up a train of cars that were to be
325 transported over defendant's line of railway from the said town of Ashdown, Arkansas, and that some of the cars which were being attached to said train were being so attached for the purpose of being transported into other states than the said state of Arkansas, then the defendant at said time was actually engaging in interstate commerce.

Excepted to by Def't.

S. H. RUSSELL, *Judge.*

XII.

If, therefore, you find from a preponderance of the evidence, under the instructions heretofore given you, that at the time of the injury to plaintiff he was assisting the defendant in engaging in interstate commerce, and he received the injuries complained of through the negligence of defendant's engineer, Chamberlain, then plaintiff is entitled to recover and you should return a verdict in his favor. If you find that said injuries were occasioned solely by reason of the negligence of the defendant or its engineer, Chamberlain, you should return a verdict for the amount of damages the plaintiff has suffered.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XIII.

If you should find under the instructions heretofore given you, that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

326

XIV.

In this connection you are instructed that contributory negligence, that is, such negligence on part of the plaintiff as would entitle you to reduce the damages he might have suffered, would be a failure upon his part to exercise at the time and place of the injury, such care and caution as a reasonable and prudent man would have exercised under like circumstances.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XV.

Before the plaintiff can be charged with contributory negligence, it must appear that such negligence contributed to his injury.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XVI.

In determining whether or not the plaintiff, at the time of the injury, was guilty of negligence contributing to his own injury, you are instructed that if he was giving the signals which were to govern the movements of the engine that Chamberlain was controlling, and if you further find that immediately before the injury, after the engine and cars attached to it had been drawn upon the passing track, he signaled such engineer to stop the train, and it did stop, and if you further find that after said train came to a stop he gave the engineer a signal not to move such train until further signal from plaintiff, and if at the time he gave such signal the engineer was looking at him and saw said signal, then you are instructed that the plaintiff had a right to assume that the engineer would obey said signal and would not start said cars in motion until he received a further signal from plaintiff.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

327

XVII.

It appears from the evidence that at the time the plaintiff sought employment with the defendant, he signed a stipulation agreeing that if he was injured while in such employ, he would, within thirty days after such injury, give to the defendant notice in writing of the circumstances attending such injury, the nature and character of the same, and his claim for damages. You are instructed that such agreement was binding upon the plaintiff, and in this connection, you are told that if, within thirty days after the injury, he did make a statement in writing to one of the officers of the defendant mentioned in such agreement, and that the defendant accepted the statement so offered as a compliance with the provisions of such agreement, then you are instructed that such stipulation would not bar the right of the plaintiff to recover.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XVIII.

You are instructed that by accepting employment as a brakesman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are

ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant.

Excepted to by defendant.

S. H. RUSSELL, *Judge.*

XIX.

Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance
328 in reaching a verdict, but whatever verdict is re-dered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the 12, agree on a verdict, you will simply sign it by your foreman and return it into court.

Excepted to by def't.

S. H. RUSSELL, *Judge.*

XX.

If you find for the plaintiff in this case, you should take into consideration in estimating his damages the pain and suffering he has undergone, the pain and suffering he is liable to undergo in the future, if any, the question whether or not his injuries are permanent or of a temporary character, his ability or lack of ability to labor and earn money in the future, the ability he possessed at the time of the injury to labor and earn money, and give him such damages as will entirely compensate him in accord with the instructions herein for all the injuries he has suffered, not exceeding the amount claimed in plaintiff's petition, and in determining this, you are also authorized to take into consideration his age, his expectancy of life and the wages he was earning at the time of his injury.

Excepted to by Def't.

S. H. RUSSELL, *Judge.*

S. H. RUSSELL, *Judge.*

On the back of said instructions appears the following endorsement: Filed in open court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

329 And thereupon, counsel for plaintiff and defendant argued said cause to the jury, and thereafter, to-wit, at the conclusion of said argument, the jury retired, having been placed in charge of a sworn bailiff, to consider of their verdict, and afterwards, to-wit, on said 11th day of December, the jury returned into Court a verdict, finding in favor of the plaintiff and against the defendant, which verdict of the jury appears in the words and figures following, to-wit:

330 STATE OF OKLAHOMA,
Carter County:

In District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Verdict.

We, the jury impaneled and sworn in the above entitled cause, do upon our oaths, find for the plaintiff and fix the amount of his recovery at $16,900., Sixteen thousand & nine Hundred Dollars.

I. R. BEST.
E. T. FOSTER.
W. L. HIGNIGHT.
J. R. HUNT.
W. J. BUTLER.
C. W. PETTY.
A. V. DOAK.
P. J. JONES.
O. A. JUHAN.

On the back of said verdict appears the following endorsement: Filed in open court Dec. 11, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

331 The journal entry of the judgment of the court as rendered on the verdict of the jury in this cause, appears in the words and figures following, to-wit:

332 In the District Court within and for Carter County, Oklahoma.

Number 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Journal Entry of Judgment.

Now on this 11th day of December, 1912, came the plaintiff herein, by his Attorneys, Stuart, Cruce & Gilbert, Cruce & Potter and L. S. Dolman, and in person, and also came the defendant by its Attorneys, R. A. Klienschmidt and J. H. Grant, and this cause came on for trial in its regular order, before a jury of twelve good

men, good and lawful citizens of Carter County, Oklahoma, who being duly empaneled and sworn to well and truly try the issues joined in said cause, according to the law and the evidence, and having heard the evidence, the charges of the Court and the argument of counsel, returned the following verdict, to-wit:

STATE OF OKLAHOMA,
Carter County:

In District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Defendant.

Verdict.

333 We, the jury impaneled and sworn in the above entitled cause, do upon our oaths, find for the plaintiff and fix the amount of his recovery at $16,900. Sixteen thousand nine Hundred Dollars.

I. R. BEST.
E. T. FOSTER.
W. L. HIGNIGHT.
J. R. HUNT.
W. J. BUTLER.
C. W. PETTY.
A. V. DOAK.
P. J. JONES.
O. A. JUHAN.

It is therefore considered, ordered and adjudged by the Court that the Plaintiff, Harry A. Brown, do have and recover of and from the defendant, the St. Louis & San Francisco Railroad Company, the sum of sixteen thousand nine hundred ($16,900.00), this judgment to bear interest from this date at the rate of six per cent per annum until paid, together with all costs of this action, for all of which let execution issue. To which entry of judgment the def't excepts.

S. H. RUSSELL, *Judge.*

On the back of said journal entry appears the following endorsement: Filed in open court Dec. 14, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

334 And afterwards, to-wit, on the 14th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said Court, and within three days after the verdict rendered herein, the defendant in said cause filed in said court

its motion for a new trial, which motion appears in the words and figures following, to-wit:

335 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation,
Defendant.

Motion for New Trial.

Comes now said defendant and moves the court to vacate and set aside the verdict and judgment rendered herein on the 11th day of December, 1912, and to grant said defendant a new trial for the following causes, which affect materially the substantial rights of said defendant:

I.

Irregularity in the proceedings of the court, jury and plaintiff, and abuse of discretion by which defendant was prevented from having a fair trial.

II.

Misconduct of the jury and the plaintiff.

III.

The verdict of the jury is not sustained by sufficient evidence and is contrary to law.

336 IV.

Error of law occurring at the trial and duly excepted to by the defendant.

V.

The court erred in denying defendant lease to file amendment to its answer, setting up the adjudication of the plaintiff as a bankrupt.

VI.

The court erred in refusing to substitute the trustee in bankruptcy in charge of the bankrupt estate of said plaintiff, as party plaintiff in this case.

VII.

The court erred in permitting and allowing plaintiff to maintain this action in his own name.

VIII.

The court erred in refusing to sustain the motion of defendant for judgment on the pleadings.

IX.

The Court erred in refusing to require the plaintiff to elect whether he would proceed in this cause under the Act of Congress of April 22, 1908, as amended, known as the Employers' Liability Act, or under the Constitution and laws of the state of Oklahoma.

X.

The court erred in admitting incompetent, irrelevant and immaterial testimony, over the objection of the defendant.

XI.

The Court erred in overruling the demurrer of the defend-
337 ant to the evidence of plaintiff.

XII.

The court erred in excluding and refusing to admit certain competent, material and relevant testimony offered by the defendant.

XIII.

The court erred in refusing to instruct the jury to return a verdict for the defendant.

XIV.

The court erred in permitting the plaintiff to reopen his case after both parties had finally rested and the witnesses had been excused.

XV.

The Court erred in his instructions to the jury and each of them.

XVI.

The court erred in giving to the jury instructions numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20, and each of them.

XVII.

The court erred in refusing to give to the jury the several instructions requested by the defendant, and each of them.

XVIII.

The court erred in receiving a verdict signed or agreed to by less than twelve jurors.

XIX.

The verdict of the jury is excessive, appearing to have been
338 given under the influence of passion and prejudice.

XX.

The court erred in permitting counsel for plaintiff to make improper and prejudicial argument and statements to the jury and in not withdrawing said statements and admonishing counsel with reference thereto.

21.

The jury erred in improperly arriving at their verdict by lot.

R. A. KLIENSCHMIDT,
J. H. GRANT,
HARRELD, WARD & HUTCHISON,
Attorneys for Defendant.

On the back of said motion appears the following endorsement: Filed in open court Dec. 14, 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

339 And afterwards, to-wit, on the 28th day of December, 1912, the same being one of the regular judicial days of the December, 1912, term of said Court, this cause came on for hearing before the Honorable S. H. Russell, Judge of said Court, on the motion of the defendant for a new trial, the plaintiff appearing by his attorneys, A. C. Cruce, W. I. Cruce and L. S. Dolman, and the defendant appearing by its attorney, J. H. Grant, whereupon the following proceedings were had and the following evidence was offered and introduced in the order following, to-wit:

Mr. A. C. Cruce: We object to the introduction of any testimony, because it is irrelevant, incompetent and immaterial.

The Court: The motion is overruled.

I. R. BEST, called as a witness by the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Grant:

Q. Please state your name to the Court.
A. I. R. Best.
Q. You live in this city, do you, Mr. Best?
A. Yes sir.
Q. I will ask you to state whether or not you were a member of the jury in the case of Harry A. Brown against the St. Louis &

San Francisco Railroad Company, number 1402, in which a
340 verdict was rendered on the 11th day of December, 1911, for the plaintiff?

A. I was.

Q. I will ask you to state whether or not you were foreman of that jury?

A. I was.

Q. Mr. Best, I will ask you to state whether or not a vote was taken as to whether or not the plaintiff or defendant should recover in this case, when the jury reached the jury room?

A. Not just then, Captain Grant.

Q. I am not speaking now of the amount, but I am asking you whether or not there was a vote to ascertain which party should recover, if either?

A. There was during our deliberations, yes sir.

Q. That was taken before you discussed the measure of damages, was it, as to which party should recover?

A. Yes sir.

Q. In voting on that, what method was used to determine what amount the plaintiff should recover?

A. You want me to state our deliberations there?

Mr. Cruce: Objected to as incompetent, irrelevant and immaterial.

The Court: I will let him answer.

Q. Having reached a conclusion that the plaintiff should recover, then what method did you adopt to find the amount?

A. The question was put to each man who was a member of that jury the amount. This one said so muc-; this one so
341 much and this one so much and so, on around, until we passed to the twelve, each man stating the amount that he thought he ought to recover.

Q. Who asked that? You as foreman?

A. Yes sir.

Q. Al- right, go ahead.

A. And after the question had gone around, and I had put the amounts of each man on the paper—I wasn't asked to do that, but I just wanted to see how the jury stood on it; and after we got through, some member of the jury asked me if I was making a notation of the amount each one stated that should be recovered. I said yes. He asked me to state what it aggregated. I summed it up and it aggregated $16,900.00.

Q. You mean the total sums added together gave you $16,900.00?

A. The total sums added together and divided by twelve.

Q. The total amounts added up and divided by twelve made after the division——

A. $16,900.00.

Q. That was the amount of the verdict returned, was $16,900.00?

A. Yes sir.

Cross-examination by A. C. Cruce:

Q. I believe you said, Mr. Best, that after you got out there, you first all discussed as to which should recover and decided that the boy was entitled to recover?

A. Yes sir, Mr. Cruce, the first question——

342 The Court: He means, was that decided in advance of the other proposition?

A. Yes sir.

Q. Then, after you decided that the plaintiff was entitled to recover, you asked each man how much he thought he ought to recover?

A. Yes sir.

Q. And those amounts varied?

A. Yes sir.

Q. Do you remember the amounts they varied from? That is immaterial. At any rate, you set down each amount, one under the other. You hadn't been requested to do that?

A. No sir.

Q. There had been no agreement among the jury that you should do that?

A. No sir.

Q. But after you got it down, someone suggested that you add it up?

A. Yes sir.

Q. You did and divided that by twelve?

A. Yes sir.

Q. And that gave you $16,900.00?

A. Yes sir.

Q. Did you all mutually agree then that that was the verdict?

A. No sir.

Q. How long after that was it before you arrived at a verdict?

Mr. Grant: We object to that as incompetent, irrelevant
343 and immaterial.

The Court: Let him answer.

To which action of the Court, the defendant then and there excepted.

A. It was quite a bit.

Q. Three-quarters of an hour or an hour?

A. I don't know; I expect so.

Q. And finally nine of the jurors signed the verdict, agreeing on this $16,900.00?

A. Yes sir.

Redirect examination by Mr. Grant:

Q. You were trying all the time to get the other three to agree to that proposition, weren't you, Mr. Best?

A. Yes, we were trying that, and each one was discussing the amount, some that it was too high and some thought it was too low.

Q. But the main effort was to get these other three jurors to agree to that amount of $16,900.00, wasn't it?
A. Yes.

Recross-examination by A. C. Cruce:

Q. You took several ballots on different amounts after you had added this up and divided it, didn't you?
A. Yes sir.

By the Court:

Q. Did you read the Court's instructions, that you must not cast lots or resort to any other method or means of chance
344 in arriving at your verdict?
A. We didn't intend to cast lots.

Mr. Grant: We object to what the witness intended.
Mr. Cruce: We suggest that there isn't an element of lot in this.

A. We discussed that.

(Witness excused.)

J. D. TANNER, called as a witness on the part of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. Grant:

Mr. Cruce: Same objection to this witness testifying as to the other.
The Court: Overruled.
To which action of the court, the plaintiff then and there excepted.

Q. You were a member of the jury in the case of Harry Brown against the Frisco, No. 1402, tried in this court on December 11th, were you, Mr. Tanner?
A. Yes sir.
Q. You have just heard the testimony of Mr. Best as to how the amount of that verdict was arrived at. I wish you would please state your recollection.
A. Mr. Best told it just like it was.
Q. The statements with reference to the manner in which it was arrived at as stated by Mr. Best are true, as you remember them?
A. Yes sir.

345 Cross-examination by A. C. Cruce:

Q. Do you remember how many ballots you took, Mr. Tanner, after you had added up and divided?
A. We took a number, quite a number; I don't know how many.
Q. Nothing was said before the addition was made that you were going to abide by the result?
A. No sir, no agreement to that, because we never did all agree to that.

Redirect examination by Mr. Grant:

Q. I will ask you if it isn't a fact that you began voting on the highest amount submitted by any juror and then voted on the amounts between that and the $16,900.00?
A. I couldn't tell you just every amount we voted on.
Q. Wasn't that the method used, Mr. Tanner?
A. I don't remember that it was.
Q. Didn't you begin at the highest amount submitted by any juror and vote on that first?
A. I don't remember.
Q. And then didn't you drop down from that sum to other sums between that and $16,900.00?
A. I don't remember.
Q. Did you vote for any sum less than $16,900.00?
A. Yes sir.
Q. Wait until I get my question through—on any sum less than that before the nine signed the verdict for $16,900.00?
A. Yes, sir.

346 The Court: I would like to ask this witness a question.

By the Court:

Q. All twelve of these men had given out the amounts they desired, you say?
A. Yes sir.
Q. Three of them refused to abide by that result?
A. Yes sir.
Q. Did those three have separate amounts among themselves, or did the three agree on one amount?
A. No sir, they had separate amounts.

(Witness excused.)

I. R. Best, re-called as a witness for the defendant, testified as follows:

Direct examination by Mr. Grant:

Q. After you had made the addition of the sums stated by each juror, and after you had divided that and obtained the sum of $16,900.00, I will ask you if you didn't then submit to the jury to be voted upon, as foreman, the amounts—the amount—the largest amount submitted by any juror?
A. You mean by that each juror's amount?
Q. Now, I mean the highest amount submitted by any juror as being the sum which he was in favor of returning in favor of the plaintiff?
A. I don't think so.
Q. What was the sum voted on first after that division was
347 made?
A. If I remember correctly, there was never a larger sum voted on that the $16,900.00. Before the contention of the jury

seemed to be it should be less and there never was an amount granted than the $16,900.00 voted on, if I remember correctly. It was discussed, however, but I don't think it was voted on.

By the Court:

Q. Did you have any agreement among that jury to abide by that result, after you had added it up and divided it?

Mr. Grant: We object to that as immaterial.

The Court: Overruled.

To which action of the Court, the defendant, then and there excepted.

A. No sir.

(Witness excused.)

Mr. A. C. Cruce: I want charge V of the Court's instructions in this case to show that it was requested by the defendant.

And thereupon the Court, after hearing the motion for new trial, the testimony as introduced on said motion, the argument of counsel, and being sufficiently advised in the premises, overruled said motion. To which action of the Court, the defendant then and there excepted, and prayed an appeal to the Supreme Court of Oklahoma, which was granted, and the defendant was allowed ninety days' extension of time in which to prepare and serve case-made, the plaintiff ten days thereafter in which to suggest amendments, the case-made to
348 be signed and settled thereafter, on five days' notice in writing by either party. The Court further ordered that execution be stayed, pending appeal, for thirty days, in order to permit the defendant to execute and file supersedeas bond in the sum of $35,000.00. To which action of the Court, in staying the execution, the plaintiff then and there excepted.

The journal entry of the judgment of the court appears in the words and figures following, to-wit:

349 STATE OF OKLAHOMA,
County of Carter, ss:

In the District Court.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Journal Entry.

Now on this 28th day of December, 1912, the same being a judicial day of the regular — term of this Court, the above entitled and numbered cause came on to be heard upon motion of defendant for

a new trial, both parties being represented by counsel, and after hearing evidence introduced in support of the motion and the arguments thereon, and being fully advised in the premises, the court is of the opinion that said motion should be overruled.

It is therefore ordered, adjudged and decreed that said motion be and the same is hereby overruled, to which ruling of the court the defendant excepts, and the exception is allowed.

For good cause shown, the time for making and serving case-made is extended, and the defendant is allowed ninety (90) days from this date within which to make and serve case-made for the
350–357 supreme court. The plaintiff is allowed ten (10) days thereafter in which to suggest amendments, the said case made to be settled and signed upon five (5) days' notice in writing by either party.

It is further ordered that execution be stayed for thirty (30) days from this date, pending appeal to the supreme Court upon the defendant making and executing a supersedeas bond, conditioned as required by law, with good and sufficient surety, in the sum of $35,000.00, to be approved by the clerk of this court.

S. A. RUSSELL, *Judge.*

On the back of said journal entry appears the following endorsement: Filed in open court Dec. 28 1912. S. F. Haynie, Clerk District Court, Carter County, Oklahoma.

* * * * * * *

358 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made and all rulings and orders made herein, all exceptions taken by the defendant to such rulings and orders; all the evidence offered and introduced upon the trial of the case and all exceptions taken by the defendant to the admission or exclusion of such evidence; all instructions and declarations of law given by the court and exceptions by the defendant thereto; all instructions or declarations of law asked by the defendant and refused by the court and exceptions of defendant thereto; the judgment of the court and the exceptions of the defendant thereto; the verdict of the jury rendered therein; and the same is a true and correct statement and a complete transcript of all the pleadings, motions, findings, evidence, judgments and all proceedings in said case.

359 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

To Harry A. Brown, the Above-named Plaintiff, and Stuart, Cruce & Gilbert, Cruce & Potter, and L. S. Dolman, His Attorneys of Record:

Toe above and foregoing case-made is hereby tendered to and served upon you and each of you as a true and correct case-made in the above entitled cause and as a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause.

R. A. KLEINSCHMIDT,
J. H. GRANT,
HARRELD, WARD & HUTCHINSON,
Attorneys for Defendant.

Acknowledgment.

We hereby acknowledge due, legal and timely service of the above and foregoing case-made, this the 11 day of March, 1913.

STUART, CRUCE & GILBERT,
Attorneys for Plaintiff.

360–362 In the District Court of Carter County, Oklahoma.

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

We, the undersigned, attorneys of record for the plaintiff in the above entitled cause, do hereby waive notice to us of the time and place of the presentation of the above and foregoing case-made to the judge of said district court before whom said cause was tried for settlement and signing, and hereby agree that said case-made may be presented to said judge for settlement and signing and be settled, signed and allowed by said judge at any time when it may suit his convenience to do so.

We further waive the issuance of a summons in error out of the Supreme Court of the State of Oklahoma, and hereby agree that we

may be entered as attorneys of record for the above named plaintiff in said Court in this cause.

STUART, CRUCE & GILBERT,
Attorneys for Plaintiff.

Mar. 19, 1913.

Filed Jun- 11 1913. W. H. L. Campbell, Clerk.

* * * * * * *

363 In the District Court of Carter County, Oklahom...

No. 1402.

HARRY A. BROWN, Plaintiff,
vs.
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, a Corporation, Defendant.

Be it remembered, That on the 26th day of March, 1913, at the court house in the city of Ardmore, county of Carter, state of Oklahoma, the above and foregoing case-made was presented to me, Stilwell H. Russell, Judge of said district court of said county, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law by Harreld & Ward, attorneys for defendant; and it appearing to me that said case-made has been duly made and served upon the plaintiff within the time fixed by the order of this court, and in the time and in the manner and form provided by law; and it further appearing that said plaintiff, by his attorneys of record, Cruce, Stuart, & Gilbert, Cruce & Potter, and L. S. Dolman, has waived notice of the time and place of the presentation of said case-made to me as Judge of said district court for settlement, and have waived their presence at the time said case-made is to be settled and signed, and have agreed that same may be settled and signed at any time; and it appearing furtner that said
364–367 plaintiff has waived the suggestion of amendments to said case-made, and the court being fully advised in the premises, and the said case-made having been examined by me, is true and correct and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments, and proceedings in said cause, I now hereby allow, certify, sign and settle the same as a true and correct case-made in said cause, and hereby order that the clerk of said court attest the same with his name and the seal of said court, and file the same of record as provided by law.

Witness my hand, this 26th day of March, 1913.

S. H. RUSSELL,
Judge of the District Court of Carter County, Oklahoma.

Attest:
[SEAL.] S. F. HAYNIE,
Clerk of the District Court of Carter County, Oklahoma.

Filed Mar. 26 1913. S. F. Haynie, Clerk District Court Carter County, Oklahoma.

* * * * * * *

368 Thereafter, at the April, 1914 Term of said Court, on the 21st day of April, 1914, the following proceeding was had in said cause, to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

(Justice Russell announces his disqualification to sit during the hearing and final determination of this cause, having presided as Judge of the District Court in the trial of the case.)

And now on this day the above cause is argued orally and the cause is submitted, and it is ordered by the court that plaintiff in error be allowed 15 days to file supplemental and reply brief.

369 And afterward, at the July, 1914, Term of said Court, on the 22nd day of September, 1914, the following proceeding was had in said cause to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Riddle, J. All the Justices concur, except Kane, C. J. not participating.

370 Filed Sept. 22, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Syllabus.

1. The facts examined and found not to bring the case within the definition of a quotient verdict or verdict by lot.

2. Upon grounds of public policy, the jurors will not be heard, by affidavit, deposition or other sworn statement, to impeach or explain their verdict by showing on what ground it was rendered, or that they made a mistake, misunderstood the law, or the result of their finding. The question as to whether or not evidence of jurors will be received to prove overt acts, resulting in an irregular or an unauthorized verdict is not involved, and the point is not decided.

3. Under all the facts and circumstances, the question of defendant's negligence was an issue for the jury. The jury having found in favor of plaintiff, and its finding has been approved by the trial court, the same will not be disturbed by this court.

4. There was sufficient evidence to carry the case to the jury; and the court did not err in overruling defendant's demurrer to the evidence and in denying its motion for a directed verdict.

5. The Seventh Amendment to the Constitution of the United States has no application to trials in state courts. The state has a right to regulate trials in its own courts, in its own way.

6. Instructions of the court examined and held to fairly cover the issues made by the pleadings and the evidence, and no error affecting a substantial right was committed in the court's instructions.

7. Defendant requested certain special instructions be given to the jury, which were refused, held: The court had fairly submitted to the jury the law applicable to the issues, and no error was committed in the action of the court in this regard.

8. The facts show that both of plaintiff's feet were crushed; that his right foot was crushed in the instep and his toes were broken so the bones protruded through the flesh, causing same to become permanently drawn out of shape; that the muscles and tendons of said foot are permanently injured, so plaintiff can never have full and free use of same; that his left foot was bruised and maimed so that a large portion of the bones of his ankle and foot were splintered and mashed, and it was necessary to remove same; that his injuries are permanent, which require him to use crutches, in order to walk; that he suffered a great deal of pain, and was under care of physicians for several months. Held: That a verdict for $16,900 is not excessive.

Error from the District Court of Carter County.

S. H. Russell, Trial Judge.

Affirmed.

371 W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, Attorneys for Plaintiff in error.
Stuart, Cruce & Cruce, Attorneys for Defendant in error.

Opinion of the court by

RIDDLE, *J.*:

This proceeding is prosecuted from a judgment of the district court of Carter County. The parties will be referred to as they were in the trial court.

The plaintiff in his petition, avers in substance that he is a resident of the State of Oklahoma, and that the defendant is a common carrier, engaged in the operation of a line of railway, and in interstate commerce between the town of Hugo, in the State of Oklahoma, and through the town of Ashdown to the town of Hope, in the State of Arkansas; that on the 20th day of February, 1911, while engaged in cutting out and taking on cars in the town of Ashdown, Arkansas, in making up a regular train destined for Hugo, Oklahoma, plaintiff was permanently injured through the carelessness and negligence of one Tom Chamberlain, engineer, engaged in making up said train; that while assisting in switching and cutting out said cars in making up said train, as his duty and as he was ordered, he signaled said engineer to stop and wait until he could throw the switch and arrange the knuckle on the end car, so that it would couple on to the main train standing on the passing track; that said engineer had stopped the train and plaintiff had thrown the switch and stepped in between the rails and between the ties to fix the knuckle on the coupler, as was his duty to do, said engineer, disobeying plaintiff's signal to wait, and without warning or notice to plaintiff, with great force, carelessly and negligently put said engine in motion and backed said cars upon plaintiff so suddenly and unexpectedly as to make it impossible for plaintiff to escape, and plaintiff was thrown violently across said rail, and both of his feet were crushed and maimed so that he
372 sustained permanent injuries; that said plaintiff's right foot was crushed in the instep and toes and the bones broken therein so that same protruded through the flesh, causing said foot to become permanently drawn out of shape; that said muscles and tendons of said foot were permanently injured, bruised and strained so that plaintiff could never have full and free use of same; that plaintiff's left foot was bruised and maimed so that a large portion of the bones of the ankle and foot were splintered and mashed so that it became necessary to remove the same, thereby crippling the plaintiff and causing him to use crutches in order to walk, and that by reason of said injuries, plaintiff suffered great mental pain and

anguish, and has been ever since said injury under constant care of physicians and surgeons. Plaintiff further alleges that it became and was his duty to so arrange the knuckle at the ends of the cars that the same would couple by impact, and while the cars on the mill track were being pulled out upon the passing track, he crossed over to the end car of the train, left standing on the passing track to open the knuckle thereon, but that the same was so defective that plaintiff was unable to open the same. The plaintiff then signaled the engineer, as aforesaid, to stop and wait while he opened the knuckle upon the rear car attached to said engine; that said knuckle was so defective that it stuck and refused to open, and that it was while so engaged that plaintiff was injured, as herein alleged, while he was in the exercise of due care and without fault or negligence on his part; that both of said cars were used by said defendant in interstate commerce and had couplers so defective that they would not couple by impact, as required by Act of Congress of March 2nd, 1893, and as amended by the Act of April 22nd, 1908 That by reason of such injuries, he sustained damages in the sum of $35,000, and prays judgment.

373 The defendant denied generally and specially all and singular every allegation in said petition, except such as were specifically admitted. It alleged that said train was a local, operating wholly within the State of Arkansas between Hope and Ashdown, and denies that either of said cars were so defective or that they were equipped with defective couplers, as alleged. It averred that said cars and each of them were properly equipped with operating levers by which the knuckles and couplers on said cars could be prepared for coupling by impact while standing outside of the track and without going between the said cars, and denies that the injuries, if any, received by plaintiff, were caused in any manner by the negligence of the defendant and alleges that if said injuries were contributed to by any act of negligence, save his own, that it was the negligence of a fellow-servant or fellow servants of the plaintiff, for which the defendant would not be liable. Defendant specifically alleges that the injuries received were due to and directly contributed to by the negligence of plaintiff.

The plaintiff filed a reply, denying all and singular the allegations of new matter in the answer, and making certain affirmative allegations, not necessary to be set out at length.

Defendant, in its petition in error, assigns twenty-two errors, but only discusses the following: (2) Misconduct of the jury, whereby defendant was prevented from having a fair trial. (3) The verdict of the jury is not sustained by sufficient evidence. (4) Errors of law occurring at the trial and duly excepted to by defendant. (11) The court erred in overruling the demurrer of defendant to the evidence of plaintiff. (13) The court erred in refusing to instruct the jury to return a verdict in favor of the defendant. (15) The court erred in his instructions to the jury and specifically in giving

374 to the jury instructions Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20, inclusive, and in giving each of said

instructions. (16) The court erred in refusing to give to the jury the several instructions requested by defendant, and in refusing to give each of said instructions, as requested. (17) Said court erred in receiving a verdict signed or agreed to by less than twelve jurors. (18) The verdict of the jury is excessive, appearing to have been given under the influence of passion or prejudice. (22) The court erred in overruling the defendant's motion for a new trial.

We will consider the various assignments relied upon in the order in which they are presented in counsel's brief, except we will group and dispose of the 3rd, 4th, 11th and 13th together, as they involve principally one proposition of law, and are controlled practically by the same state of facts. It is sufficient to say that the plaintiff's testimony substantially sustains the allegations in his petition, as set out.

Under the first assignment presented by counsel, "misconduct of the jury" it is contended that it is shown from the testimony of two of the jurors that the amount of the verdict was arrived at by aggregation and average, and is what is denominated a "quotient verdict." It is not only the contention of the defendant's counsel that they have a right to show irregularity in the proceedings of the jury, resulting in an irregular verdict, but that by the testimony of two of the jurors, they have actually shown that this verdict was the result of a lot or chance; hence, it is contrary to law. It is the contention of plaintiff's counsel, however, (1) that the testimony fails to show that the verdict is the result of a chance or lot, or a quotient verdict; and, (2), that under the rule laid down by this court, testi-
375 mony of jurors will not be received for the purpose of impeaching their verdict. We have carefully read the testimony of the two jurors, and are of the opinion that it fails to show that this verdict is the result of chance or lot; nor is it a quotient verdict. In substance, the testimony of the jurors shows that after they had agreed that the plaintiff should recover, at the request of the foreman, each juror stated the amount which in his judgment the plaintiff should recover. Without an agreement to do so, someone suggested to the foreman to add the various amounts together and divide it by twelve, which was done, and the result was $16,900. The testimony of each of the jurors, however, shows that after this was done, there were several votes taken on the question as to the amount the plaintiff should recover; and, finally, nine of the jurors concurred in the verdict for $16,900. A quotient verdict is defined to be "a verdict where each juror marks down an amount, then the amount thus marked down, being added together, the sum is divided by the number of jurors and the result rendered as their verdict." This must be done as the result of an agreement in advance to make it their verdict. The facts do not show that the verdict in question is a quotient verdict. 29 Cyc. 812, under the head of New Trials, treats this subject as follows:

"A verdict will not be set aside merely because the amount thereof was the result of a compromise between jurors, nor because the amount was first found by adding together the amounts the several jurors thought should be given and dividing the sum by twelve, if

there was no agreement in advance to return a verdict for the quotient so found."

There are cases from California, Colorado, Delaware, Illinois, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, Texas, Utah, Michigan, Wisconsin, and from the Federal courts cited in support of the text.

In the cases of City of Kinsley vs. Morse, 40 Kan. 588, it is stated in the syllabus:

376 "Where a jury are deliberating upon what their verdict shall be, and during such deliberation a ballot is taken by which it is ascertained that all of the jurors are in favor of the plaintiff, and thereupon each juror marks on a slip of paper the amount he believes the verdict should be, and such marking shows the lowest to be $3,000 and the highest $5,000, and it is then proposed by a part of the jury to aggregate such sums and divide by twelve, which is done, and the quotient is found to be $4,400, but no agreement is made that such marking, aggregation and division shall determine their verdict, but afterward such sum is agreed to, and returned as their verdict: Held, Where such verdict has been approved by the trial court, this court will not disturb the judgment."

In the case of Parshall vs. Minneapolis & St. L. Ry. Co., 35 Fed. 649, the court, speaking through Mr. Justice Brewer, said:

"Two affidavits were filed charging misconduct on the part of the jury; one, an affidavit of a juror that a verdict was reached in pursuance of an agreement that each juror should write down the amount which he thought the plaintiff should receive, and, after adding them together and dividing by 12, that the amount so reached should be the verdict. Of course, if a verdict is reached in pursuance of an agreement to abide by the result of such an addition and division, it is misconduct such as would vitiate the verdict. But it is also true that it is not improper, and is common in matters of this kind, where the amount does not rest upon any fixed rule, but depends upon the discretion of the jury, for each juror to put down the amount which he thinks the plaintiff ought to receive, and the sum of the amounts being divided by twelve places before the jury a basis for further discussion and agreement; and when that is all that is done, such attempt to reach concord and agreement does not vitiate the verdict."

To the same effect, see: Gulf C. & S. F. Ry. Co. v. Blue, — Tex. Civ. App. —, 102 S. W. 128; McDonnell v. Pescadero Stage Co., 120 Cal. 476; Barton v. Holmes, 16 Ia. 252; Kennedy v. Kennedy, 18 N. J. L. 450; Tinkle v. Dunivant, 16 Lea (Tenn.) 503; Bell v. Butler, 34 Wash. 131; McMurdock v. Kimberlin, 23 Mo. App. 523.

It will be seen from the case last quoted that the facts are much like the facts in the case at bar; the material difference being that in the case now before us, after the aggregate sum was divided by 12, there *was* several votes taken, resulting finally in 9 jurors concurring in the verdict returned, which happened to be the result ob-

377 tained by dividing the aggregate amount. It must be of practically universal knowledge, and especially to the profession and the courts, that verdicts of jurors are more or less the result of

compromise. It would be next to impossible to reach a verdict in every case, if this was not so. The court is not able to say that the verdict in this case was not the deliberate opinion of each juror concurring therein, based upon the evidence. This court has held several times, without any apparent qualification, that affidavits or testimony of jurors will not be received for the purpose of impeaching their verdict; Colcord v. Conger, 10 Okla. 458; Barnes v. Territory, 19 Okla. 373; Pitchlynn vs. Cherry, 32 Okla. 77; Tulsa St. Ry. Co. v. Jacobson, 40 Okl. 118; Glockner v. Jacobs, (not yet reported).

Counsel very strenuously question the soundness of these decisions, and claim that the rule based upon sounder reason is found in the case of Crawford v. State. 2 Yearg. 60, by the Supreme Court of Tennessee, and in the case of Perry v. Bailey, 12 Kan. 539, the latter opinion being by Justice Brewer, and others cited where the general and broad rule is modified. While we are impressed with the reason and logic advanced in the opinions cited, inasmuch as we hold that the evidence in this case fails to show that the verdict is a result of a lot or chance, or what is denominated a quotient verdict, we are not inclined to enter into an elaborate discussion of the wisdom of modifying the *board* rule heretofore announcel by this court.

The 3rd, 4th, 11th and 13th assignments challenge the action of the court in overruling the demurrer to the evidence and overruling the motion for a directed verdict. The basis of defendant's contention is that when the court, at the request of plaintiff, withdrew from the consideration of the jury that part of his cause of action relating to defective couplers, plaintiff thereby withdrew from the
378 consideration of the jury all testimony relating thereto, and hence, the effect of which was to leave the case in such condition to show that plaintiff was guilty of contributory negligence, and that all of his testimony bearing upon his cause of action, under the employers' liability law, is unreliable, and should not be given any weight. It is contended that the only logical conclusion is, that in withdrawing from the consideration of the jury his cause of action, based upon defective couplers, after he had testified, is a conclusive admission on his part that the testimony given by him relating to his cause of action under the employers' liability law was false, and hence leaves no reliable testimony for the consideration of the jury, tending to sustain his cause of action. In this conclusion we are unable to agree. These things may materially, but no- necessarily, affect plaintiff's credibility, as a witness, and the weight which might otherwise be given to his testimony, certainly it does not necessarily follow that his testimony is, as a matter of law, false. Had he only alleged a cause of action under the employers' liability law, his testimony as to the defective couplers would have been competent for the purpose of showing a state of facts which justified him in going between the cars, where he claimed he was at the time he was injured. This testimony would have been proper for the purpose of showing that he did not contribute to his own injury. Instead of this being conclusive proof that his testimony upon this point was false, or that he was mistaken, in the couplers being de-

fective, it may be that this part of his cause of action was withdrawn from the consideration of the jury by his counsel over his protest, and while still contending that the couplers were, in fact, defective.

If only one cause of action had been alleged, as we have
379 shown, it would have been perfectly proper for the plaintiff to have testified to the defective condition of the couplers, if he found the same to be in a defective condition, for the purpose of justifying his conduct in being between the cars at the time of the injury, as tending to show that he was not guilty of contributory negligence. It would likewise have been competent for the defendant in order to have shown, if it could have done so, that the couplers were in perfect condition, and that all that was necessary for the plaintiff to have done was to use the lever, which he could have done without getting in between the cars. The plaintiff may have been mistaken in his testimony; that is, he may have been mistaken as to the actual condition of the couplers; yet if he honestly believed and had sufficient facts and circumstances existed at the time, justifying the belief in an ordinary and reasonable man, it would have made a proper issue for the court to submit to the jury for their determination, whether or not be was guilty of contributory negligence. Suffice it to say, that in any event, it was within the province of the jury to pass upon the credibility of this witness and the weight to be attached to his testimony. This issue, having been properly submitted to the jury under a proper instruction, and since there was sufficient evidence to warrant the court in submitting it to the jury, their finding thereon and the approval of their verdict by the trial court is conclusive upon this court.

It is the further contention of defendant, under the assignments which we are discussing, that the court erred in overruling defendant's demurrer to the evidence; for it is claimed that plaintiff failed to show that he was employed and engaged in interstate commerce at the time he was injured. There seems to be no controversy regarding the law, but the issue arises under testimony, tending to show that plaintiff was engaged at the time he was injured in in-
380 terstate commerce, as defined by the provisions of the act of Congress. It seems from the charge of the court given to the jury, to the giving of which there was no exception, the court, as well as the respective counsel, practically agreed upon the law governing the issue upon this point. The court's instruction was as follows:

"You are instructed that the first question to be determined by you, after entering upon your deliberations, is whether the plaintiff, at the time he sustained the injuries alleged, was employed by the defendant in interstate commerce. In order to so find, it is incumbent upon the plaintiff to establish by a fair preponderance of the evidence that he was at the time of the alleged injuries actually engaged in assisting in the movement of transportation of a car or cars of freight, destined for movement from a point in one state to a point in another state. It is immaterial whether there was any freight in the other cars of the train, that was to be transported between interstate points, but plaintiff must show by a fair preponder-

ance of the evidence that the car or cars that he was engaged in switching at the time of the injury, or the freight in such cars, was destined for movement between interstate points. If you so find, then the Act of Congress of April 22, 1908, would apply in this case. If, on the other hand, plaintiff has not established that he was so employed in interstate commerce at the time of the injury, then the Act of Congress of April 22, 1908, would not apply in this case."

The only question presented for our consideration is whether or not there was sufficient testimony to warrant the court in submitting this issue to the jury. The testimony of the plaintiff upon this point, in substance, is as follows:

I came from Hope to Ashdown on that day. We reached there about 10:30 in the morning. Defendant's main line and passing track at Ashdown run east and west. It also has a connection there with another road, and a spur going to the staving mill. The swing brakeman works in the middle and handles the switch list. His name was Dan Godbold. Godbold went in ahead of me, and before I entered he came out and told me to bring the engine out on the mill track; that he had to make up the Hugo train. This was about 11 o'clock. We went through the necessary requirements to follow the instructions of the switch list and make up the train. Tom Chamberlain was the engineer. The engine was headed west.
381 Godbold was giving directions from the switch list. He told me we were making up a train for Hugo. We took some cars from the mill spur and put some of them on our train; and took some back, spotted them, and did various other switching. By "our train," I mean the train we were working up for the Hugo crew. When we got through our switching on the staving mill spur, we backed back in there and spotted some cars there. I cut the car I got hurt from, or cut the others from it, and gave the engineer the go-ahead signal. This car and others was attached to the engine which was headed west. There were some cars on the passing track. It was the train we were making up. I walked over to the west end of this cut of cars that was on the passing track and tried the knuckle—the west knuckle. It is necessary to open one of the knuckles when you are going to make a connection between two cars. There is a knuckle on each end of the car. I went there to open the knuckle on the west end of that car. I tried the lever and it would not work, and I tried the knuckle with my hands, and it only gave a portion of the way out.

In answer to questions, the witnesses stated:

"Q. Godbold, you say, was giving directions from the switch list?

A. Yes sir.

Q. And his statements to you were that you were making up a train that was going to Hugo?

A. Yes sir."

Questions propounded to the engineer, Mr. Chamberlain:

"Q. Don't you know that the crew that was there was making, waiting for the train to be made up, to bring it on to Hugo?

A. I knew there was a crew there waiting for that."

The witness further testified:

"Q. What were they waiting for?
A. Waiting for the stuff we brought in.
Q. What do you mean by that? You mean the cars that you brought in from the east?
A. The cars that we brought in from the east; they were going to take them on west.
Q. This other crew?
A. Yes sir.
Q. Whose crew were they?
382 A. Conductor Sanders'.
Q. Where did that run go? From Ashdown on west to Hugo?
A. Yes sir."

The law is, without doubt, that as a prerequisite to the right of plaintiff to recover, under the Employers' Liability Law, it was necessary for him to show that at the time of the injury he was actually engaged in interstate commerce. In a late case, not yet reported, upon a certificate from the Circuit Court of Appeals of the Fifth Circuit, Mr. Justice Van Devanter, speaking for the Supreme Court of the United States, stated the rule as follows:

"Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of both classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce. * * * Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146." St. L. & S. F. & Texas Ry. Co. v. Seale, 229 U. S. 156.

383 In the fifth paragraph of the court's charge, the jury was specifically instructed that it was incumbent upon plaintiff

to show, by a fair preponderance of the evidence, that he was at the time of the alleged injuries actually engaged in assisting in the movement or transportation of a car or cars of freight destines for movement from a point in one State to a point in another State. Under this clear declaration of the law, if there were sufficient testimony to warrant the court in submitting this issue to the jury, and we hold there was, and the jury having found the issue in favor of plaintiff, which has been approved by the trial court, such finding should be, and is, conclusive upon this court. If the question were before this court for decision, in the first instance, upon the record before us, we are not prepared to say, as a matter of law, that plaintiff was not at the time of his injury, engaged in interstate commerce, but would feel justified in holding, under the rule laid down by the United States Supreme Court, that he was at the time of the injury, engaged in interstate commerce.

It is next insisted that the court should have directed a verdict for the defendant, for the reason, it is claimed, that the testimony conclusively shows that plaintiff's injury was due to an assumed risk. It is insisted that this cause of action, having been based upon the Federal Employers' Liability Act, it superseded the provision of our Constitution, and therefore, is a question of law for the court to determine, and in this case, should not have been left to the jury. We have examined the evidence carefully and are of the opinion that the court did not err in refusing to instruct the jury to return a verdict for the defendant. Under the general law, and independent of the provision of our Constitution, where the question of assumption of risk depends upon a controverted issue of fact, it is a question to be submitted to the jury, like all other questions of fact. There
384 was sufficient testimony before the court and jury to warrant the court in submitting the issue of the assumption of risk to the jury, and the trial court, having approved their verdict, it will not be disturbed by us.

Under assignment of error 15, counsel strenuously urge that the court erred in giving to the jury certain instructions. The first one of which complaint is made is instruction 18, relative to the assumption of risk. The instruction is as follows:

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in; and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant. But you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

It is the latter part of the instruction to which complaint is made, claiming that after plaintiff withdrew his charge of negligence respecting the condition of the couplers on the cars involved, the sole charge of negligence remaining was alleged negligence of the engineer in moving the engine in disregard of plaintiff's signal for him

not to do so. It is contended that the language used by the court is equivalent to an assumption of negligence on the part of the engineer, and therefore a comment on the weight of the evidence. In this conclusion, we are unable to agree with counsel. We fail to see how the jury could have been misled in this instruction. The court told the jury, in plain language that if the plaintiff's injury was occasioned by one of the incidents ordinarily attending the occupation for which he was employed, they should find for the defendant. The issue of assumption of risk was raised by the defendant in its answer; and certainly, it was proper to charge the jury upon this issue.

385 After stating to the jury that plaintiff could not recover for an injury resulting from a risk which he himself had assumed, it was not prejudicial to further state to the jury that the plaintiff did not assume the risks that were attendant upon his fellow-servants. Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress, the rule seems to be that the assumption of risk is not a defense; and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the court would not have been warranted in submitting this issue to the jury. The fact that the court may have committed error in charging the jury on this point, under such circumstances, would not warrant a reversal. Inasmuch as we hold there is no substantial error in the court's instruction, affecting the defendant's rights, it is not necessary to enter into an elaborate discussion of this proposition.

It is insisted that instruction No. 13, given to the jury, is erroneous. The instruction reads:

"If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him."

The specific grounds of objection are that the court should have used the word "shall" instead of "should" that the word "should" is merely advisory; and that the jury was left at its discretion in the matter of reduction of the damages. It has been said that the word "should" is the past tense of the word "shall" and we think, in the connection in which it was used, the jury understood that it meant more than simply advisory.

386 In the case of Smith v. State, 41 N. E. 595, the Supreme Court of Indiana held that it was more imperative than the word "may."

In the case of Lynch v. Bates, 139 Ind. 206, where the court charged the jury that in passing upon the weight of the evidence, etc., they "should" take into consideration the interest of the witness,

etc., the court reversed the case, holding that the word "should" there was too imperative.

In the case of Durands, Adm'r v. N. Y. & L. B. R. Co., (N. J.) 48 Atl. 1013, the court held that the word "should" implies the performance of some obligation or duty. Often the word "shall" is used to mean "may." So, it will be seen that either of the terms cannot be considered abstractly, but must be considered in connection with the subject-matter and sense in which it is used.

It is next contended that the instruction is erroneous, because the court did not require the jury to find that plaintiff was injured while engaged in interstate commerce, but simply stated that if the plaintiff was injured while defendant was "engaging" in interstate commerce. Suffice it to say that the court, in instruction No. 5, charged the jury fully upon this point. The instruction here to which complaint is made did not purport to cover this point.

It is further urged that this instruction does not give the jury any intelligent rule by which to assess the damages, in the event the jury found that plaintiff's negligence partially contributed to the accident; while we do not approve this instruction as a model, yet we are convinced that the jury was not in any way misled by taking the instruction as a whole, when considered in connection with the other instruction given.

387 We think this instruction fairly stated the rule, as applied to the act of Congress, by which the jury was to be governed in fixing the amount plaintiff was entitled to recover.

It is next insisted that instruction No. 19 was prejudicial. This instruction, in effect, advised the jury that as many as nine of their number concurring could return a verdict. It is earnestly contended that this was error, for the reason that plaintiff's cause of action arose under the Federal Employers' Liability Law; hence, all the rights of both parties must be measured by the Federal Constitution and laws, and that this includes the procedure governing the trial in Federal courts. It is said that under the Federal Constitution, defendant was entitled to a unanimous verdict of a jury of twelve, and that this right of a unanimous verdict must apply in all cases where the Federal Employers' Liability Law is involved, whether the suit is in the State of Federal Court. This contention is not sound. It would seem that to state the proposition would be sufficient to disclose the fallacy of the argument. Were it not for the recognized ability of counsel and the zeal and earnestness displayed in pressing this point, we should be inclined to dispose of it by what we have just said. While it is true the state courts are under a sworn duty to recognize and enforce the Constitution and laws of the Federal government, yet this does not mean that the state must follow the procedure of the Federal government provided for the conduct of its own courts; that while the state must recognize the Federal Constitution and laws as supreme and enforce them as such, yet in its courts it can only be required to enforce them in accordance with the procedure provided by the state for the enforcement of its own laws. We apprehend that the state has the power to abolish a trial by jury altogether, and

provide that all questions, both of law and fact, should be
388 determined by the court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the state court, and he be denied a jury trial in accordance with the state law; yet, if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a Federal statute. The state is called upon often to enforce and administer the Federal laws in her courts; yet she is only required to do so in the manner provided by and in harmony with the state law, and cannot be compelled to follow the procedure provided by the Federal government for its own courts. The Seventh Amendment to the United States Constitution has reference only to the Federal courts, and such territorial courts as are established by Congress and under the control of the Federal government, and has no application to the state courts. Quotations from a few decisions will demonstrate this to be sound:

In the case of Walker v. Sauvinet, — U. S. —, the court, speaking through Chief Justice Waite, with reference to the Seventh Amendment to the Constitution, said:

"This amendment, as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. 492. The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way." Pearson v. Yewdall, 95 U. S. 294; Hall v. Armstrong, (Vt.) 20 L. R. A. 366.

In Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, discussing the jurisdiction of a state court to entertain a cause of action under the Federal Employers' Liability Act, after an elaborate discussion of the proposition, it was said:

389 "We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

The expression "adequate to the occasion" evidently means when, according to the state law, the state courts have jurisdiction over the subject-matter and the parties. The cases cited and relied on by counsel have no application here. As shown by the decisions, the courts there were speaking in reference to the Federal courts or territorial courts, which are necessarily controlled by the Federal Constitution and statutes. Counsel have cited no authority, and we believe none exists, where it is held that the state courts must abandon their procedure and apply the Federal procedure on account of the fact that a right arising under a law of Congress is involved. The expressions of the courts on this subject are all to the contrary.

It is next contended that the court erred in charging the jury on the measure of damages. We have carefully considered this instruction in connection with the other charge of the court, and find no

prejudicial error. We doubt if this instruction, standing alone, would have misled the jury, and when considered with the whole charge, we find no ground for complaint. The court in this charge specially directed the jury to the other portion of the charge. The court, in another section, had charged the jury relative to diminishing the damages in the event they found that plaintiff had contributed to his own injury. It was not necessary to repeat it again in this section.

390 It is next contended that the court committed error in refusing to give certain requested instructions. We have duly considered the action of the court in refusing to give the various charges requested by the defendant, and find this complaint without merit. Several of these requested instructions were faulty as being a charge upon the weight of the evidence, and besides, the court had fully and fairly covered every point raised by the pleadings and which were sought to be covered by the instructions requested.

It is finally urged that the verdict of the jury is excessive. After a careful consideration of this point, we are not prepared to say, under the facts and circumstances of this case, that the verdict is excessive. The trial court and the jury had a much better opportunity to pass judgment upon this matter than we. The record shows this to be rather an aggravated case. We are unable to place ourselves in a position to gain the knowledge from the physical facts and expressions of the plaintiff and many circumstances in connection therewith. The appellate court should, with great reluctance, disturb a solemn finding of a jury, on the ground that it is excessive, after it has been approved by the trial court. We should be thoroughly satisfied that the jury was actuated by passion, prejudice, partiality, or corruption. The verdict should be so outrageously large and excessive as to shock the conscience of man on first blush, before we should feel authorized to use this extraordinary power by reversing or requiring a remittitur. The fact that if we were sitting as jurors we would not fix the amount so large as did the jury, is not sufficient; for, in that case, we would simply be substituting our judgment for that of the jury and the trial judge. St. Louis & S. F. Ry. Co. v. Richards, 23 Okla. 256; 4th Sutherland on Damages, # 1256; 13 Cyc. 126.

391 In the case of San Antonio & A. P. Ry. Co. v. Connell, — Tex. Civ. Ap. —, 66 S. W. 246, plaintiff was an engineer, earning about $135 to $150 per month. He was 41 years of age; lost the use of one leg, though it was not amputated. A verdict for $18,000 was cut to $16,000, and sustained.

In Missouri, K. & T. Ry. Co. v. Stinson, 78 S. W. 986, plaintiff was a switchman, 26 years of age, earning $90.00 per month. The ankle joint of his right foot was injured, making said joint permanently stiff, and he could not walk without crutches, and his leg was crooked. A verdict for $15,000 was sustained.

In Lynch v. American Linseed Co., 107 N. Y. Sup. 458, plaintiff's legs were mangled and crushed so he was made a cripple. A verdict for $20,000 was sustained.

In M. K. & T. Ry. Co. v. Farriss, 120 S. W. 535, plaintiff was a

young man, of industrious habits. He lost the use of both legs and was a permanent cripple. A verdict of $23,750 was sustained.

In Galveston, H. & S. A. Ry. Co. et al. v. Harris, — Tex. Civ. App. —, 159 S. W. 907, plaintiff was a brakeman, 35 years old, in good health, and earning an average salary of $100 a month. His right leg was dislocated at the hip, and thereafter it became paralized, which wholly prevented his use of the leg. Whether this condition was permanent was not clear. A verdict of $27,500 was reduced to $22,500 and sustained.

392 In Gennaux v. Northwestern Imp. Co., — Wash. —, 130 Pac. 347, the injury to plaintiff resulted in the loss of use of one leg. A verdict for $18,000 was sustained.

In case of Coleman v. Southwich, 9 Johns, 40, Chancellor Kent laid down the rule as follows:

"The damages, therefore, must be so excessive as to strike mankind at first blush as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

We think this is a sound rule, and approve the same. This is in harmony with the holding in the case of C. R. I. & P. v. Devore, decided at this term.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

All the Justices concur, except Chief Justice Kane, not participating.

393 In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,

vs.

HARRY A. BROWN, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error and respectfully asks for a reconsideration and rehearing upon the decision of this Court, rendered herein on September 22, 1914, by which decision the judgment of the lower court in the above entitled cause was affirmed, for the reason that questions decisive of said case, and duly submitted by counsel, have been overlooked by the Court, and that the decision is in conflict with controlling decisions of this Court and with controlling decisions of the Supreme Court of the United States, which have been overlooked, as will be more fully hereinafter set out.

The propositions upon which we rely in support of this petition for rehearing will be discussed under the following hands:

I.

The decision is erroneous in that the Court is in error in holding that the verdict of the jury was not arrived at by lot or chance, and that said verdict was not a quotient verdict.

II.

The decision is erroneous in holding that the demurrer of plaintiff in error to the evidence of defendant in error should not have been sustained:

(1) Because the decision is predicated upon a hypothetical case rather than upon the record herein.

394 (2) Because the decision is predicated upon a misconception of the evidence.

(3) Because the decision is erroneous, in that the Court's reasons as to why a verdict should not have been directed for the plaintiff in error are predicated upon a misconception of the evidence and of the law applicable thereto.

III.

The decision is erroneous in that it announces a doctrine respecting the assumption of the risk of employment that is in conflict with decisions of this Court, and with decisions of the Supreme Court of the United States.

IV.

The decision is erroneous in that it holds that the lower court's instruction No. 13 is a correct exposition of the law applicable to the facts in this case; when, as a matter of fact, it is in direct conflict with the spirit and intention of the Employers' Liability Act, and in direct conflict with the decision of the United States Supreme Court, construing said Act.

V.

The decision is erroneous in that it holds that the lower court's instruction on the measure of damages is correct and is in accord with the rule laid down by the Supreme Court in construing the Employers' Liability Act.

VI.

The decision is erroneous in that it holds that nine jurors may return a verdict in an action prosecuted in a State Court, under the Employers' Liability Act.

VII.

The decision is erroneous in that the Court fails to consider the error of the trial court in refusing to submit to the jury the plaintiff in error's theory of the case.

395 VIII.

The decision is erroneous in that the Court fails to consider the error of the trial court in refusing to give the several instructions requested by plaintiff in error, and of which it complains.

IX.

The decision is erroneous in that it holds that the damages awarded to defendant in error are not excessive, and in that the decision of the Court, upon this feature of the case, is predicated upon a misconception of the evidence.

Wherefore, Plaintiff in error prays that a rehearing of said cause may be had by this Honorable Court; and further prays, in view of the heavy trial docket which counsel for plaintiff in error have, and the importance of the questions involved, that an order be made allowing plaintiff in error twenty (20) days from the 7th day of October, 1914, in which to prepare and file briefs in support of this petition for rehearing.

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J. H. GRANT,
Attorneys for Plaintiff in Error.

Service of the within and foregoing petition for rehearing and receipt of a copy thereof is hereby acknowledged this 6th day of October, 1914.

STUART, CRUCE & CRUCE,
Att'ys for Defendant in Error.

Filed Oct. 6, 1914. W. H. L. Campbell, clerk.

396–398 And afterward, on October 6, 1914, the following proceeding was had in said cause, to wit:

5209.

St. L. & S. F. R. Co., Plaintiff in Error,
vs.
Harry A. Brown, Defendant in Error.

And now on this October 6, 1914, it is ordered by Turner, J., that the mandate of this court in the above cause be stayed, and plaintiff in error allowed 15 days to file brief in support of petition for rehearing.

* * * * * * *

399 Supreme Court, January Term, 1915, March 2nd, 1915, Fifteenth Judicial Day.

5209.

ST. L. & S. F. R. R. Co., Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

And now on this day the above cause comes on for hearing before the court, and upon application therefor in open court, it is ordered by the court that the stipulation herein asking leave to detach exhibits from the original case made, to be attached to the case made on appeal to the Supreme Court of the United States, be filed.

400 In the Supreme Court of Oklahoma.

No. 5209.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between counsel for plaintiff in error and defendant in error, respectively, that the original exhibits attached to the original case-made, except a certain pair of overalls and the shoes which defendant in error wore at the time he was injured, now on file in the office of the Clerk of the Supreme Court of Oklahoma, may be detached from the case-made and attached to the copy of said case-made, which is to be filed in the Supreme Court of the United States.

Dated this 2 day of March, 1915.

R. A. KLEINSCHMIDT,
Attorney for Plaintiff in Error.
STUART, CRUCE AND CRUCE,
Attorneys for Defendant in Error.

Filed Mar. 2, 1915, William M. Franklin, Clerk.

401 In the Supreme Court.

5209.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Now on this 4th day of March, 1915, it is ordered by Kane, C. J., that the stipulation to detach exhibits from the original case made to

be attached to case made on appeal to the Supreme Court of the United States be and the same is hereby allowed

402 In the Supreme Court of the State of Oklahoma.

Certificate.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the *the* foregoing 401 pages, numbered from 1 to 401, both inclusive, are a full, true and complete transcript of the record and all proceedings in cause No. 5209, St. Louis and San Francisco Railroad Company, Plaintiff in error. vs. Harry A. Brown, Defendant in error, as the same remains of record and on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 5th day of March, 1915.

[Seal Supreme Court. State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

403 In the Supreme Court of the United States.

No. 874.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Statement of Errors and Part of the Record to be Printed.

Comes now St. Louis and San Francisco Railroad Company, plaintiff in error herein, and for a statement of the errors upon which it intends to rely, says: That it intends to rely upon the errors set forth in its assignment of errors, numbered from 1 to 10 inclusive, filed in this cause and made a part of the record herein.

And said plaintiff in error hereby designates the parts of the record to be printed, which it thinks necessary for the consideration of this Court, and designates the parts of the record to be omitted, viz:

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W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Attorneys for Plaintiff in Error.

We, the undersigned attorneys of record for the defendant in error, hereby acknowledge service of the within and foregoing statement of errors and part of record to be printed, this 1st day of April, 1915.

L. S. DOLMAN,
STUART, CRUCE & CRUCE,
Attorneys for Defendant in Error.

408 [Endorsed:] No. 874. 24,618. In the Supreme Court of the United States. St. Louis and San Francisco Railroad Company, Plaintiff in Error, vs. Harry A. Brown, Defendant in Error. Statement of errors and part of the record to be printed.

409 [Endorsed:] File No. 24,618. Supreme Court U. S., October term, 1914. Term No. 874. St. Louis & San Francisco R. R. Co., Pl'ff in Error, vs. Harry A. Brown. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed April 5, 1915.

410 In the Supreme Court of the United States.

No. —.

ST. LOUIS AND SAN FRANCISCO RY. CO., Plaintiff in Error,
vs.
HARRY A. BROWN, Defendant in Error.

Statement of Portions of the Record That Defendant in Error Desires Printed.

Now comes the Defendant in Error, Harry A. Brown, and in addition to the parts of the record required by the Plaintiff in Error to be printed, he designates the following portions of the record, which should be, and which he requests to be printed.

I.

The Cross-Examination of N. E. Jacques, pages 262-266 inclusive.

II.

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III.

Testimony of J. E. Roberts, pages 274-277 inclusive.

411 —.

Cross-Examination of D. N. Baldwin, pages 279-283 inclusive.

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Testimony of Frank Robinson, pages 292-297 inclusive.

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Testimony of Joe Pierce, pages 297-299 inclusive.

VIII.

Testimony of Harry A. Brown, pages 299-300 inclusive.

IX.

Testimony of Harry A. Brown pages 303-304 inclusive.

X.

Requested instruction No. 6 on page 308.

C. B. STUART,
A. C. CRUCE,
M. K. CRUCE, AND
L. S. DOLMAN,
Attorneys for Defendant in Error.

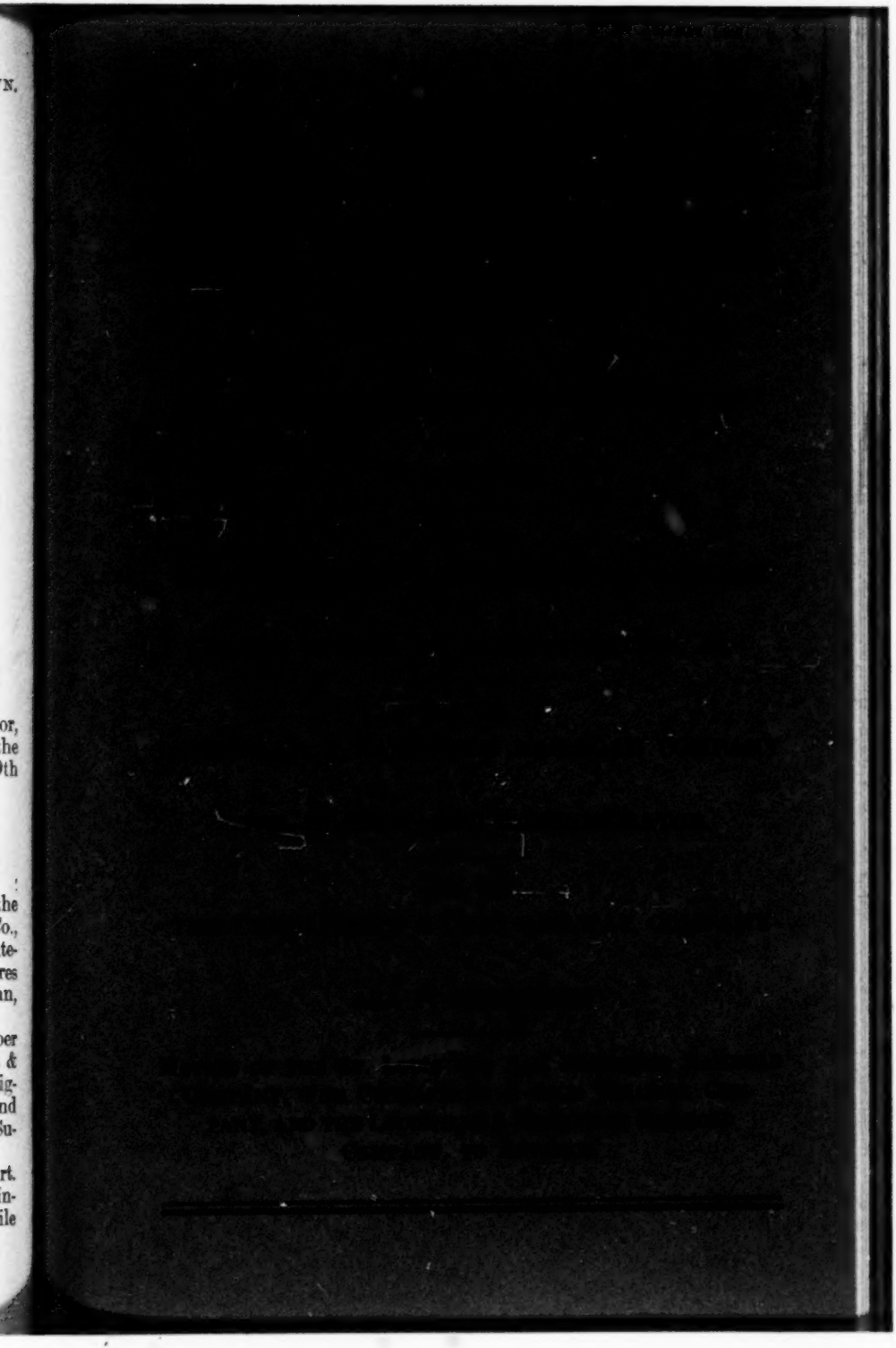
We, the undersigned attorneys of record for the plaintiff in error, hereby acknowledge service of the within and foregoing parts of the record designated by the defendant in error to be printed, this 19th day of May, 1915.

R. A. KLEINSCHMIDT,
——— ———,
Attorneys for Plaintiffs in Error.

412 [Endorsed:] 874/24618. In the Supreme Court of the United States. No. 874. St. Louis & San Francisco Ry. Co., Plaintiff in Error, vs. Harry A. Brown, Defendant in Error. Statement of Portions of the Record that Defendant in Error Desires Printed. C. B. Stuart, A. C. Cruce, M. K. Cruce, and L. S. Dolman, Attorneys for Defendant in Error.

413 [Endorsed:] Supreme Court of the United States, October Term, 1914. File No. 24,618. Term No. 874. St. Louis & San Francisco Ry. Co., Pl'ff in Error, vs. Harry A. Brown. Designation by defendant in error of parts of record to be printed, and proof of service of same. Filed May 21, 1915. Clerk's Office, Supreme Court U. S.

Endorsed on cover: File No. 24,618. Oklahoma Supreme Court. Term No. 399. St. Louis & San Francisco Railroad Company, plaintiff in error, vs. Harry A. Brown. Filed March 17th, 1915. File No. 24,618.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 399

ST. LOUIS AND SAN FRANCISCO RAILROAD CO.

v.

H. A. BROWN.

No. 453

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

SARAH DWYER, AS ADMINISTRATRIX, &c.

No. 485

LOUISVILLE & NASHVILLE RAILROAD COMPANY

v.

WM. H. STEWART'S ADMINISTRATOR

No. 743

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN

MOTION OF THE ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, TO ADVANCE.

Come now counsel for the St. Louis and San Francisco Railroad Company, The Chesapeake & Ohio Railway Company and the Louisville & Nashville Railroad Company, and move the court to advance the above entitled causes to be heard at the same time with the case of *The Chesapeake & Ohio Railway Company* v. *Kelly's Administratrix*, No. 321, October Term, 1915.

In the four causes thus sought to be advanced and heard at the same time, there is presented a question common to them all (and presented, also, in No. 321), which question is, whether the Seventh Amendment of the Constitution of the United States is a restraint upon Congress and prevents Congress from committing to the State courts for trial causes of action under the Federal Employers' Liability Act (35 Stat. 65, 66; 36 Stat. 291), in States where jury trial as preserved in the Seventh Amendment is no longer preserved. Stated in another way, the question is whether State courts in such of the States as have jury

trials by fractional verdicts, or by less than a common law jury, are appropriate, adequate, and competent courts to try causes under said Federal Employers' Liability Act. An early determination of this question is necessary to designate the *fori* wherein these causes of action shall be entertained. Public interests are, accordingly, involved. The consolidation of these five cases to be heard together will sacrifice no interest of the litigants, the Constitutional question being common to all five cases.

W. F. EVANS,
Of counsel for St. Louis and San Francisco Railroad Company.

DAVID H. LEAKE,
E. L. WORTHINGTON,
Of counsel for The Chesapeake & Ohio Railway Company.

SIMS, RODES & SIMS,
BENJAMIN D. WARFIELD,
Of counsel for the Louisville & Nashville Railroad Company.

Counsel for defendant in error, in *Louisville & Nashville Railroad Company* v. *Wm. H. Stewart's Administratrix, No. 485.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *Louisville & Nashville Railroad Company* v. *Wm. H. Stewart's Administratrix, No. 485,* to be heard with the case of *The Chesapeake*

& Ohio Railway Company v. *Kelly, Administratrix, No. 321,* October term, 1915.

SIMS, RODES & SIMS,
BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

To Messrs. B. F. Proctor and Wright & McElroy, counsel for defendant in error.

Service of the above notice is accepted this 22nd day of January, 1916.

B. F. PROCTOR,
GEORGE H. LAMAR,
WRIGHT & MCELROY,
Counsel for Defendant in Error.

Counsel for defendant in error, in
The Chesapeake & Ohio Railway Co. v. *Asa P. Carnahan, No. 743.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *The Chesapeake & Ohio Railway Co.* v. *Asa P. Carnahan, No. 743,* to be heard with the case of *The Chesapeake & Ohio Railway Co.* v. *Kelly, Administratrix, No. 321,* October term, 1915.

DAVID H. LEAKE,
Counsel for Plaintiff in Error.

To Messrs. Allen & Walsh, counsel for defendant in error.

The above notice is accepted and concurred in, this 25th day of January, 1916.

H. W. WALSH,
Counsel for Defendant in Error.

Counsel for defendant in error in
The Chesapeake & Ohio Railway Co. v. *Sarah Dwyer, as Admx., etc., No. 453.*

Sirs:

Please take notice that a motion will be made at a session of this court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *The Chesapeake & Ohio Railway Co.* v. *Sarah Dwyer, as Admx., etc.,* to be heard with the case of *The Chesapeake & Ohio Railway Co.* v. *Kelly, Administratrix, No. 321,* October term, 1915.

E. L. WORTHINGTON.
Counsel for Plaintiff in Error.

To George B. Martin and Dinkle & Pritchard.
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 26th day of January, 1916.

DINKLE & PRICHARD,
GEORGE B. MARTIN.
Counsel for Defendant in Error.

Gentlemen:

Please take notice that a motion will be made at a session of this Court to be held on the 31st day of January, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, to advance said case of *St. Louis and San Francisco Railroad Company* v. *H. A. Brown, No. 399,* to

be heard with the case of *The Chesapeake & Ohio Railway Company* v. *Kelly, Administratrix, No. 321,* October Term, 1915.

W. F. EVANS,
Counsel for Plaintiff in Error.

To Stuart, Cruce and Cruce,
Counsel for Defendant in Error.

The above notice is accepted and concurred in, this 24th day of January, 1916.

A. C. CRUCE,
Counsel for Defendant in Error.

The Chesapeake & Ohio Railway Company, plaintiff in error in case No. 321, hereby consents that causes named in the caption of this motion, Nos. 399, 453, 485 and 743, be advanced to be heard at the same time as case No. 321.

THE CHESAPEAKE & OHIO RAILWAY CO.,
By JOHN T. SHELBY,
Its Attorney.

This January 25, 1916.

19

Office Supreme Court, U. S.
FILED
MAR 18 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Plaintiff in Error,
vs.
HARRY A. BROWN,
Defendant in Error.

No. 399.

In Error to the Supreme Court of Oklahoma.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

W. F. EVANS,
R. A. KLEINSCHMIDT,
J. H. GRANT,
Counsel for Plaintiff in Error.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, *Plaintiff in Error,* vs. HARRY A. BROWN, *Defendant in Error.*	No. 399.

In Error to the Supreme Court of Oklahoma.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Harry A. Brown, defendant in error (hereinafter referred to as plaintiff), instituted suit in the District Court of Carter County, Oklahoma, to recover damages on account of personal injuries alleged to have

been sustained at Ashdown, in the State of Arkansas, on February 20, 1911. Plaintiff's petition was based upon the Federal Safety Appliance Act and upon the Federal Employers' Liability Act (Tr., pp. 22, 24). The trial resulted in a verdict and judgment for plaintiff in the sum of $16,900, which judgment was on appeal to the Supreme Court of the State affirmed (144 Pac. 1075). Petition for rehearing was filed, which was overruled, and a writ of error obtained from this Court to reverse the judgment of the Supreme Court of the State of Oklahoma.

This case was on February 21, 1916, ordered advanced, with cases Nos. 453, 478, 485 and 743, to be heard with case No. 321, as one case. A joint brief having been filed in these cases on the question of the seventh amendment as affecting Federal employers' liability cases in state courts, this supplemental brief will deal with other points involved in this case, with supplemental argument on the right of trial by jury, in cases arising under the Federal Employers' Liability Act.

The Federal questions presented arise out of the construction and application of the Act of Congress of April 22, 1908 (35 Stat. at L. 65), as amended by the Act of April 5, 1910 (36 Stat. at L. 291), known as the Federal Employers' Liability Act; the act was pleaded in plaintiff's petition, and the questions arise out of the defense of assumption of risk, under that act, the

effect to be given plaintiff's contributory negligence, if found, the measure of damages under the act, and the right of less than the full number of twelve jurors to return a verdict under the act. The jury in District Courts of Oklahoma is composed of twelve men; but, by provision of the State Constitution, nine members of such jury, concurring, may return a verdict. In this case the verdict, in favor of plaintiff and against the defendant, was returned by nine jurors (Tr., p. 156).

The printed record does not include the entire record certified by the Clerk of the Supreme Court of the State, but only such parts thereof as are necessary for a consideration of the issues presented to this Court for determination, the record having been prepared and printed pursuant to paragraph 9 of rule 10 of this Court.

ABSTRACT AND REVIEW OF EVIDENCE.

Plaintiff's petition, filed in the District Court of Carter County, alleges that the defendant was engaged in the operation of a line of railway between Hugo, in the State of Oklahoma, and Hope, in the State of Arkansas, and that the plaintiff, while employed as an extra freight brakeman, engaged in making up a train destined for Hugo, Oklahoma, at the Town of Ashdown, Arkansas, was injured through the negligence of defendant's engineer. It is further alleged that, while

engaged in switching cars at said place, plaintiff stepped between the rails to fix the knuckle on the coupler of a certain car, whereupon the engineer of the train, disregarding plaintiff's signal to wait, suddenly backed said car against the plaintiff, precipitating him to the ground, causing certain injuries. It is further alleged that the couplers on both cars which plaintiff was engaged in preparing to be coupled together were so defective that they would not couple automatically by impact, as required by Act of Congress of March 2, 1893 (Safety Appliance Act); that it was therefore necessary for plaintiff to go between the ends of the cars to fix same so that they would couple by impact (Tr., pp. 22-3-4).

To this petition defendant answered in part as follows (Tr., pp. 27 to 30):

IV.

"Further answering and for further defense, defendant specifically denies that either or both of the cars described in paragraph 5 of plaintiff's petition was defective, or that the same were equipped with couplers so defective that they would not couple automatically by impact as required by the Act of Congress of March 2nd., 1893, as amended by Act of April 22nd, 1908; and said defendant specifically denies that the said cars, or either of them, were not equipped with couplers and appliances in strict compliance with said Acts of Congress.

V.

"Further answering and for further defense, defendant specifically denies that it was or became the duty of said plaintiff, or was necessary for him in the performance of his duties, to go in between the ends of the said cars in order to fix the same, or to make a coupling, and alleges that said cars and each of them were properly equipped with operating levers by which knuckles and couplers on the said cars, and each of them, could be prepared for coupling by impact by plaintiff while standing outside of the track, and without going between the said cars.

VI.

"Further answering and for further defense, defendant denies that the injuries, if any, sustained by the plaintiff were caused in any manner by the negligence of this defendant, and alleges that if his said injuries were caused or contributed to by any act of negligence save his own, it was the negligence of a fellow servant or fellow servants of the said plaintiff, for which the defendant would not be liable.

VII.

"Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the said plaintiff were due to and directly contributed to by his own negligence in the premises, in this, to-wit, that the said plaintiff, while engaged as brakeman in assisting in the switching of cars at Ashdown, Arkansas, gave the

engineer of the train a signal to back up, in obedience to which the said engineer caused the engine and cars connected therewith to back, and the said plaintiff carelessly and negligently, in disregard of his own safety and the rules of the company, went between two of said cars while they were moving, or in front of one of the cars while so moving, and in some way unknown to this defendant slipped and fell upon the rails and was run over; that it was not necessary for the plaintiff to go between or in front of the moving cars, and that his act in doing so was in plain disregard of his own safety and was the direct cause of his injury.

VIII.

"Further answering and for further defense, defendant alleges that at the time plaintiff secured employment with the defendant, as a part of the consideration of his employment by said company, he entered into a contract and agreement, signed by him, which has at all times since been in full force and effect, and a copy thereof is hereto attached, marked 'Exhibit A' and made a part hereof.

"That in paragraph 12 of said contract it is provided as follows:

> " 'In further consideration of such employment, I agree that if, while in the service of said company, I sustain any personal injury for which I shall or may make claim against the company for damages, I will, within thirty days after receiving such injury, give notice in writing of such claim to a superintendent,

claims attorney or claim agent of said company, which notice shall state the time, place, manner and cause of my being injured, and the nature and extent of my injuries, and the claim made therefor, to the end that such claim may be fully, fairly and promptly investigated, and my failure to give written notice of such claim in the manner and within the time aforesaid shall be a bar to the institution of any suit on account of such injuries.'

"Defendant alleges that the said plaintiff has wholly failed, neglected and refused to comply with such provision of said contract and has not given any notice in writing of his claim for the alleged injuries to the superintendent, claim attorney or claim agent of the defendant, stating the time, place, manner and cause of his injuries and the nature thereof and the claim made therefor; and defendant alleges that by the failure of the plaintiff to give such notice as is required by said contract he should be barred from maintaining this suit, or recovering any damages thereunder.

IX.

"Further answering and for further defense, defendant alleges that at the time plaintiff secured employment with the defendant he entered into a written contract, duly executed by him, as part consideration of securing such employment, a copy of which is hereto attached, marked 'Exhibit A', and made a part hereof.

"That in paragraph 12 of said contract it is stipulated and agreed as follows:

" 'I hereby certify that the foregoing statements are true, and hereby apply for a situation in the service of the St. Louis & San Francisco Railroad Company; and, if accepted, agree to pay all my bills promptly each month, to maintain strict integrity of character, to abstain from the use of intoxicating liquors, to avoid visiting saloons or places where liquor is sold, to familiarize myself with the general and special rules and regulations of the department of service in which I may be employed and faithfully observe the same, and keep advised of such amendments to said rules and regulations as may hereafter be made, and to perform my duties to the best of my ability; and when I leave the service from any cause, voluntarily or otherwise, I agree that all board bills I owe shall be deducted from wages due me. I hereby authorize said company to make monthly deductions from my wages, in accordance with circular No. 35 of June 29, 1899, and pay the same to the Employes' Hospital Association of the Frisco System; and if I am accepted as an employe I authorize the deduction of one dollar to cover medical examination fee. I understand that standing in front or getting onto an engine or car coming towards me is dangerous and is in violation of the rules, and if done by me will be at my own risk; that great care must be exercised in approaching and passing all bridges and overhead structures, as they will not clear a man standing on top of a high, covered car, and that it is dangerous to climb up

and down the sides of cars while passing water-tank spouts, sandhouse pipes, coal houses, seed houses, cotton platforms or other structures near the track, as they will not clear a man with safety. I understand that going or remaining between cars to couple or uncouple them, or for any other purpose, while they are in motion, is dangerous and is forbidden by the rules of the company, and I agree to refrain from so doing.

" 'I understand that the duties of a brakeman expose me to great danger, the risk of which I assume to myself and agree to use constant and proper care to prevent injury to myself and others.'

"In addition thereto, plaintiff signed an additional paragraph on the last page of said agreement, recognizing that he was prohibited from going between cars. That the plaintiff thereby agreed and undertook to assume the hazards and risks of his employment; that the occupation of brakeman on a freight train is necessarily a dangerous and hazardous one; that the plaintiff, well knowing this fact, as aforesaid, applied for and secured employment with the defendant as such brakeman and elected to remain in the employ of the defendant, with full knowledge of all the risks, hazards and dangers incident to his employment, and he thereby assumed such risks, dangers and hazards; and defendant alleges that if the plaintiff was injured as alleged, such injuries were the direct result of a risk of his employment assumed by him, by reason of which he is not entitled to recover herein.

"That among the rules promulgated by the defendant company, and in force on its lines, necessary for the safety of employes, were the following, which were well known to the plaintiff when he accepted employment of the defendant and which, as aforesaid, he undertook and agreed to obey:

"'**General Notice.**

"'To enter or remain in the service is an assurance of willingness to obey the rules.

"'Obedience to the rules is essential to the safety of passengers and employes and to the protection of property.

"'Employes in accepting employment assume its risks.

"'Rule No. 630. All persons entering into or remaining in the service of this company are warned that the business is hazardous and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

"'Rule No. 631. Each employe is required to be responsible for his own safety, as well

as to exercise the utmost caution to avoid injury to his fellow employes. Employes of every rank and grade are warned to see for themselves before using them that the rolling stock, machinery or tools which they are required to use are in safe condition or that they are so put before using them.

" 'Rule No. 632. The company does not require or expect its employes to incur any risk from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.

" 'Rule No. 634. Inasmuch as the coupling apparatus of cars is not uniform in style, size or strength, and as deadwoods and drawbars do not always have the same projections, and various other causes render it dangerous to expose the hands, arms or person of those engaged in coupling cars, all employes will be expected to use the utmost care in coupling or uncoupling cars or engines, to guard against personal injury, and must not go between cars while they are in motion.

" 'Rule No. 636. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen will be obeyed when obedience to those signals on the part of the engineman or fireman is essential to the safety of an employe in the performance of his duty. He must know that the signal has been seen, understood and obeyed before plac-

ing himself in a dangerous position—otherwise, without such knowledge he assumes all risks of danger arising from any misunderstanding or disregard of signals.

"'Rule No. 637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed or go between cars in motion to uncouple them, or to follow other dangerous practices.'

"That the plaintiff thereby assumed the risks incident to his employment; that his injuries, if any, were sustained as an incident of such risks, by reason of which he is not entitled to recover herein.

"Further answering and for further defense, defendant alleges that the injuries, if any, sustained by the plaintiff were directly due to his own negligence and want of care in this, among other things, to-wit, that he carelessly and negligently violated the provisions of his written contract of employment heretofore referred to, and also all or part of the following rules and regulations of the company, to-wit: Rules Nos. 630, 631, 632, 634, 636 and 637, which said rules have heretofore been set out in paragraph IX hereof; and defendant alleges that if the plaintiff had observed said rules he would not have sustained any injuries; that he could have performed his duties as brakeman, with entire safety to himself; that it was not necessary for him to go between cars, or to go in front of a moving car; nor was it necessary for him to oper-

ate, or attempt to operate, or adjust the couplers or knuckles on the car or cars in question, while he was between cars or on the track; that the plaintiff in doing these acts, or either of them, was acting in direct violation and disregard of the rules and regulations of the defendant which had been established for his own safety, as well as said agreement; and that if he was injured while so doing he was guilty of contributory negligence, directly causing such injuries, by reason of which he is not entitled to recover herein.

"Wherefore, having fully answered, defendant asks to be hence discharged with its costs."

At the trial of the case it appeared that plaintiff, at the time he was injured, was employed by the defendant as brakeman, and was running between Hope and Ashdown, both towns being in the State of Arkansas.

Plaintiff states that he left Hope early in the morning, arriving at Ashdown about 10:30 a. m. Reference to Plaintiff's Exhibit "A" (Tr., insert after page 144) will disclose the location and direction of defendant's tracks at Ashdown. During the switching operations just preceding plaintiff's injury a number of cars had been placed on the passing track east of the switch connecting the stave mill track with the passing track, and about a quarter of a mile east of the depot. Afterward, a string of about twelve cars was picked up by the engine, west of the stave mill connection, some of which were to be placed on the stave mill track. The

engine was headed west. Brakeman Brown was following the engine and was riding the string of cars. Brakeman Godbold was handling the switching list and was on the ground. Godbold threw the switch to enable the cars to be pushed in on the stave mill track.

Up to this point there appears to be no serious dispute in the evidence; but there is a sharp conflict as to the circumstances of the accident to plaintiff. However, in view of the contention of the defendant, as made in the trial court, in the State Supreme Court, and here, that, in so far as pertains to the assumption of the risk of injury by the plaintiff, but one conclusion can be drawn from the evidence, it is deemed proper to briefly review the same.

Plaintiff claims that, after the cars were spotted on the stave mill track, he cut them loose from the other cars attached to the engine, which were six or seven cars, and that he then gave the engineer the "go-ahead" signal; that he rode the rear car of the string for a short distance and then stepped off and walked in a southerly direction over to the string of cars standing on the passing track, which they were going to couple onto; that he caught hold of the lever and tried to open the knuckle of the coupler, but it would not work; that he then turned and faced the west, and just as the string of cars attached to the engine was passing through the switch on to the passing track he gave the engineer a stop signal, and that when the

string of cars came to a stop the east end of the rear car was from four to seven feet west of the stave mill switch; that he moved up about three steps and lined the switch; and that he then gave the engineer a spot signal, which meant for him to stand still until he got another signal; that he then went south across the track to get to the lever for the purpose of operating the knuckle on that car; and that he stopped between the rails, took hold of the lifting pin, and it would not work the knuckle; that he then put his right hand on the knuckle to open it, and just as he got his hand on the knuckle he heard the motion of the cars—the engine taking up the slack—and heard them coming back; that he stepped out to the left and as he did so the car hit him in the side and knocked him down; that he rolled over to try to get out of the way and succeeded in getting all of his body beyond the south rail, except his feet; and that they were run over and mashed—the left one seriously, and the right one not so badly.

Defendant's evidence shows that, after the cars were spotted on the stave mill track, plaintiff rode the string of cars attached to the engine out to the switch; that as the last car passed through the switch he dropped off the car, gave the engineer a stop signal, threw the switch, and then gave a back-up signal while standing at the switch and on the north side of the passing track; that he then started across the track just be-

hind the car, and passed out of sight of the engineer, and was not seen again until after he was injured.

There was no dispute in the evidence that, as alleged in defendant's answer, plaintiff, in his application for employment, recognized the risks to be assumed in the occupation of brakeman; also, that under the rules of the defendant, with which he was familiar, plaintiff was prohibited from going between cars while in motion, and assumed all risks of injury from any misunderstanding or disregard of signals given the engineer (Tr., pp. 28, 29, 54, 55). It also appears that he had been employed as brakeman on the line in question since July previous to the accident, and was familiar with the stations along that line, including Ashdown (Tr., p. 55).

Plaintiff alleges in his petition that the coupling apparatus on both the end of the car that struck him and on the west end of the car of the stationary string of cars to which they were going to couple were out of order and would not operate and makes this his excuse for giving the standstill signal, and for going between the rails to adjust the coupler. But, when the evidence was all in, plaintiff withdrew his charge of negligence respecting the condition of the couplers, and the trial court, at plaintiff's request, instructed the jury with respect thereto as follows:

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim that

plaintiff's injuries were caused, in whole or in part, by failure of defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

The trial court, refusing to direct a verdict for the defendant, submitted to the jury the question of whether plaintiff was engaged in interstate commerce at the time of the accident, charged the jury as to the defense of assumption of risk and the effect to be given plaintiff's contributory negligence, if found, and likewise charged the jury on the measure of damages. The jury was further instructed that if as many as nine agreed on a verdict, those so agreeing should sign the verdict.

The questions involved herein, and the manner in which same arose, are briefly stated as follows:

By motion for a directed verdict, which was overruled by the trial court (Tr., p. 147), which ruling was reviewed and affirmed by the State Supreme Court (Tr., pp. 174, 175), defendant contended that in view of the evidence, and in view of the abandonment by plaintiff of his claim that the injuries were caused, in whole or in part, by defective couplers and safety appliances, required by the Federal Safety Appliance Act, he should be held by the Court as a matter of law, the facts being undisputed, to have assumed the risk of injury by going between, or in front of, moving cars;

and that therefore a verdict should have been directed for the defendant. The Supreme Court not only denied this contention, thereby depriving it of a right arising under the Federal Employers' Liability Act, but further held that defendant could not interpose the defense of the assumption of risk in this cause, thereby depriving defendant of a right arising under said Federal Employers' Liability Act (Tr., p. 179).

A question also arises from the instruction to the jury given by the trial court (Tr., p. 154), that if nine jurors agreed they could return a verdict, and from the Court's action in approving and rendering judgment upon the verdict signed by less than twelve jurors (Tr., pp. 155, 156); this ruling of the trial court being reviewed and affirmed by the State Supreme Court in its opinion (Tr., pp. 180, 181), by which it is contended that the defendant was deprived of a right arising under the Federal Employers' Liability Act.

Other questions arise out of the instructions given by the trial court to the jury, duly excepted to by defendant, as follows:

> "(13) If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such

negligence on part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him" (Tr., p. 152).

"(18) You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow-servant" (Tr., p. 153).

"(19) Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court" (Tr., p. 154).

The giving of said instructions, and each of them, was approved by the State Supreme Court (Tr., pp.

178, 179, 180). Defendant contends that it was thereby deprived of substantial rights arising under the Federal Employers' Liability Act.

Other questions arise out of the refusal of the trial court to give to the jury the instruction requested by the defendant as follows:

> "(12) If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:
>
> " 'That in all actions hereafter brought against any such comomn carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributed to such employe.'
>
> "The statute requires the jury to diminish the amount of recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the Court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in statute we are required to look to the intent and pur-

pose of the statute and the context in which we find the word. I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence

of the plaintiff and the balance remaining will be the amount of your verdict'' (Tr., p. 12).

The ruling of the trial court upon this instruction was affirmed by the State Supreme Court (Tr., p. 182), and defendant claims that it was thereby deprived of substantial rights under the Federal Employers' Liability Act.

ASSIGNMENT OF ERRORS.

(Tr., pp. 10, 11, 12, 13, 14 and 15.)

I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, State of Oklahoma.

II.

The Supreme Court of Oklahoma erred in not reversing said judgment of the District Court of Carter County, State of Oklahoma.

III.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause; and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, was not exclusive of the Constitution, laws, and regulations of the State of Oklahoma, as to actions prosecuted under said act.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error

grew out of a violation of a statutory duty, arising under an Act of Congress; and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not abandon and withdraw all his testimony respecting such alleged violation of said statute.

VI.

The Supreme Court of Oklahoma erred in holding that, after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

VII.

The Supreme Court of Oklahoma erred in holding that the following instructions, given by the trial court, was not erroneous:

"(13) If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of the defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, but that you should reduce his damages in proportion to the amount of negligence which was attributable to him. Excepted to by defendant, S. H. Russell, Judge."

VIII.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

"(18) You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow-servant. Excepted to by defendant, S. H. Russell, Judge."

IX.

The Supreme Court of Oklahoma erred in holding that the following instruction, given by the trial court, was not erroneous:

> "(19) Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is, the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court. Excepted to by defendant, S. H. Russell, Judge."

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give the following instruction to the jury:

> "(12) If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:
>
> > "'That in all actions hereafter brought against any such common carrier by railroad

> under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'

"The statute requires the jury to diminish the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the Court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word . struct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words 'in proportion' as used in this statute to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.

"You should first consider whether or not the defendant was guilty of negligence and whether

or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence, as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determine the whole amount of such damages sustained by the plaintiff, and, having done so, you must diminish such damages by deducting therefrom such proportion or just share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict. Refused; defendant excepts. S. H. Russell, Judge."

BRIEF OF ARGUMENT.

III, IX.

The Supreme Court of Oklahoma erred in holding that nine jurors might return a verdict in said cause, and in holding that the Act of Congress, commonly referred to as the Employers' Liability Act, approved April 22, 1908, as amended, was not exclusive of the Constitution, laws and regulations of the State of Oklahoma as to the actions prosecuted under said act.

The verdict in this case, upon which judgment for the plaintiff was rendered, was signed by nine jurors (Tr., p. 156). This verdict was returned pursuant to instruction No. 19 given by the trial court and duly excepted to by defendant (Tr., p. 154), which is as follows:

> "Gentlemen, you are further instructed in this case that you must not cast lots or resort to any other method or means of chance in reaching a verdict, but whatever verdict is rendered must be upon the deliberate judgment of the juror and concurred in by at least nine of you, and if as many as nine agree and a less number than twelve agree on a verdict, those so agreeing will each sign the verdict. If all of you, that is the twelve, agree on a verdict, you will simply sign it by your foreman and return it into court."

This verdict and this instruction were challenged by

motion for new trial (Tr., pp. 158, 159), and the contentions of defendant were expressly ruled upon and denied by the opinion of the Supreme Court of Oklahoma (Tr., p. 181), and the point is raised in this court by assignments of error III and IX.

What is presented herein under these assignments is supplemental to the argument in the joint brief filed in this and other cases on the question of the Seventh Amendment as affecting Federal employers' liability cases in state courts.

Section 19, Article II of the Constitution of Oklahoma provides as follows:

> "The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but in county courts and courts not of record a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases and in criminal cases less than felonies three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors the verdict shall be in writing and signed by each juror concurring therein."

It is manifestly the settled doctrine of the Federal Courts that Congress, in the exercise of its admitted power to regulate commerce between the states, has taken complete possession of the subject of liability of interstate carriers for injury to their servants while in the discharge of any duty in connection with interstate commerce.

In the case of *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, in the seventh paragraph of the syllabus, it is held:

> "The common-law rule with respect to the employe's assumption of risk of injury from a defective appliance governs an action brought under the Employers' Liability Act of April 22, 1908, where such appliance is not covered by any Federal statute enacted for the safety of employes, to the exclusion of any state statutes which, like N. C. Revisal 1905, Sec. 2646, abolished the assumption of risk as a bar or an action by a railway employe for an injury attributable to defective appliances furnished by the employer, since otherwise the subject-matter would be controlled by the laws of the several states, and not by the Federal statute, which, in section 4, abolishes the defense of the assumption of risk only when the violation by the carrier of a Federal statute enacted for the safety of the employes contributed to the death or injury of an employe."

Respecting the power of the several states to con-

trol or limit the defense of assumed risk by statutory or constitutional provisions, the Court say:

> "But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common-law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common-law rule. The adoption of the opposite view would in effect leave the several state laws, and not the Act of Congress, to control the subject-matter."

The manifest purpose of Congress in taking possession of the subject of the liability of interstate carriers for injuries to their employes was to insure a uniform rule by which such liability should be measured, irrespective of the rules and regulations adopted by the several states with respect thereto. The same purpose—uniformity respecting liability of an interstate carrier—is manifested by Congress, as interpreted by this Court, in the Interstate Commerce Act.

With respect to the objects to be attained by that act, this Court, in *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, say:

> "This branch of interstate commerce was being subjected to a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier

> whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount, and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law, and this purpose will be effectuated, and not impaired or destroyed, by the state courts obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

If plaintiff's case had been tried in Ohio, and three of the jurors, before whom the case was tried, had refused to concur in the verdict, plaintiff could not have obtained a verdict against the defendant in the sum of $16,900. And in that State there would have been a mistrial, or the three dissenting jurors would have forced the other nine to have returned a verdict for a smaller sum.

It is patent, therefore, that the interstate carrier who is sued in Ohio, or in any other state where the concurrence of twelve jurors is necessary to return a verdict, has an advantage over the carrier who is sued in Oklahoma. It is equally patent that the law is not uniform in its application to carriers operating in different states.

If, therefore, it was the purpose of Congress to establish a uniform rule by which the liability of interstate carriers should be measured, on account of injuries sustained by their employed while assisting in interstate commerce, that purpose is defeated by giving effect to Section 19 of Article II of the Constitution of Oklahoma. But, in the Croninger case, *supra*, it is said respecting the diversity of rules by which liability is measured:

> "The congressional action has made an end to this diversity, for the national law is paramount, and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated and not impaired or destroyed by the state courts obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

The rule announced by this Court in the case of *Mondou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, is practically the same as that announced in the Croninger case. In the Mondou case it is said:

> "This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them.
>
> "And particularly opposite is the repetition of

that principle in Smith v. Alabama, 124 U. S. 465, 473, 31 L. Ed. 508, 510, 1 Inters. Comp. Rep. 804, 8 Sup. Ct. Rep. 564:

> " 'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it its conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the surpemacy of the national authority.'

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Smith v. Alabama, 124 U. S. 465, 473, 480, 482, 31 L. Ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. Ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Reid v. Colorado, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506. The inaction of Congress, how-

ever, in nowise affected its power over the subject. The Lottawanna (Rodd v. Heartt), 21 Wall. 558, 22 L. Ed. 654; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. Ed. 910, 15 Sup. Ct. Rep. 802; Southern R. Co. v. Reid, No. 487, 22 U. S. 424, *ante*, 257, 32 Supreme Ct. Rep. 140; Northern Pac. R. Co. v. Washington, No. 136,222 U. S. 370, *ante*, 237, 32 Sup. Ct. Rep. 160."

In commenting upon the jurisdiction of the state courts the Court say:

"Because of some general observations in the opinion of the Supreme Court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or effect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdic-

> tion, as prescribed by local laws, is appropriate to the occasion', because we are advised by the decisions of the Supreme Court of errors that the superior courts of general jurisdiction are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant. * * * We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, **as prescribed by local laws,** is adequate to the occasion."

The primary question to be determined, therefore, is: Has the State of Oklahoma, as prescribed by its Constitution and local laws, a court with jurisdiction "appropriate to the occasion" or "adequate to the occasion"?

In Section 2 of the Act of 1906 it is provided:

> "All questions of negligence and contributory negligence shall be for the jury."

In Section 3 of the Act of 1908 it is provided:

> "But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe * * *."

It is clearly apparent from the foregoing provisions that both parties to a suit arising under the act under discussion are entitled to a jury trial. But suppose that the State of Oklahoma should by constitutional provision abolish all trials by jury and provide that all questions of fact should be determined by the Court—could it be seriously urged that the State courts, thus constituted, were "adequate to the occasion"? To propound the question is to answer it. However, if the State of Oklahoma may provide by constitutional provision that nine jurors concurring may return a verdict in a case arising under this act it may, in the same manner, provide that six jurors, or three jurors, concurring, may return a verdict. And it may likewise, in the same manner, abolish trials by juries altogether. In fact, it is held by the Supreme Court of Oklahoma, in the decision herein, that the state may abolish a trial by jury altogether, the Court saying (Tr., pp. 180, 181):

> "* * * We apprehend that the state has the power to abolish a trial by jury altogether and provide that all questions, both of law and fact, should be determined by the Court. Should this be done, and a suit involving a right under the Federal statute be instituted by a party in the State court, and he be denied a jury trial in accordance with the state law; yet, if such party, seeking to enforce his right under the Federal statute, were accorded the same mode of procedure

> that all citizens of the state were entitled in the enforcement of rights under the state law, it could not be successfully urged that such party was entitled to a jury trial on the ground that he was seeking to enforce a right granted to him by a Federal statute."

The power once conceded, there is no limitation to its exercise.

In the joint brief herein the question as to what kind of jury the act contemplates is fully discussed, and further argument upon that proposition is deemed unnecessary.

I.

The Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Carter County, State of Oklahoma.

IV.

The Supreme Court of Oklahoma erred in holding that plaintiff in error's liability to defendant in error grew out of a violation of a statutory duty, arising under an Act of Congress, and in holding that the plaintiff in error could not interpose the defense of assumption of the risk in said cause.

V.

The Supreme Court of Oklahoma erred in holding that, when defendant in error abandoned and withdrew his claim that his injuries were caused in whole or in part by failure of the plaintiff in error to equip its cars with couplers and safety appliances, as required by Act of Congress of March 2, 1893, he did not abandon and withdraw all his testimony respecting such alleged violation of said statute.

VI.

The Supreme Court of Oklahoma erred in holding that, after the abandonment and withdrawal of said alleged cause of action, pleaded by defendant in error, plaintiff in error was not entitled to interpose the defense of assumption of the risk as a defense to defendant in error's cause of action which was not abandoned and dismissed.

Plaintiff's cause of action was brought under the Federal Employers' Liability Act of April 22, 1908, and the Safety Appliance Act of March 2, 1893. He was run over by a string of moving cars, while between the rails immediately in front of same, and he realized that, in order to recover damages for his injuries, it would be necessary for him to explain his being in such an obviously dangerous place. He also knew that he would have to give some excuse for giv-

ing the engineer a stand-still signal, as he claims to have done, after he had given him a stop signal. Therefore, he charged in his petition that the couplers on the two cars which were to be coupled together were defective and could not be operated by the levers with which they were equipped; hence, the necessity for the stand-still signal, and his presence between the rails in front of the moving cars. But this claim was so conclusively refuted by the defendant's testimony that the Court, at plaintiff's request, charged the jury as follows (Tr., p. 150):

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim that plaintiff's injuries were caused, in whole or in part, by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

By abandoning and withdrawing the charge and claim that the couplers were defective plaintiff swept away every pretext and every excuse for giving a stand-still signal, and he likewise swept away every pretext and every excuse for placing himself between the rails in front of the moving cars. If the couplers were not defective, then there was no reason for him to give a stand-still signal, and no excuse for his going in between the rails to adjust the coupler on the car which ran over him.

Plaintiff swore positively, in his direct examination, that the couplers were defective. He reiterated this statement on cross-examination; and yet, after defendant had put on its evidenec and overwhelmed him with its volume and weight, he requested the Court to give the foregoing instruction, which was tantamount to an admission on his part that his testimony respecting the condition of the couplers was untrue. In going into the place he did he violated the rules of the defendant, violated his agreement with the defendant to obey the rules, and violated the clearly expressed legislative intent of Congress.

In the case of *Gilbert v. Burlington, C. R. & N. Co.*, 128 Fed. 529, Judge Thayer, speaking for the Court, at page 539, said:

> "I think that the Act of Congress which was passed for the protection of brakemen amounts to a legislative declaration that a brakeman ought not to step in between the rails to uncouple a car in a moving train, and when it appears that a brakeman has placed himself in such a situation unnecessarily, not being compelled to do so by stress of circumstances, and receives an injury, he is guilty of such negligence as prevents a recovery. The testimony in the case at bar, as I view it, shows that the plaintiff stepped in between the rails when the train was moving, without adequate excuse for so doing, and that this act on his part beyond controversy immediately contributed

to his injury, and the court below properly instructed the jury that he could not recover."

We respectfully submit that, in withdrawing his charge of negligence respecting the condition of the couplers, plaintiff necessarily withdrew and abandoned all the evidence offered in support of that charge. He necessarily withdrew and abandoned the evidence respecting the giving of the stand-still signal claimed to have been given to the engineer; because if the couplers were not defective there was no excuse or reason for his giving this unusual and extraordinary signal. Respecting this signal he says:

"Q. [illegible] it necessary or usual to give him (the engineer) another sign after you had given him a stop signal?

A. It sometimes insures greater impression. He is liable to take some other fellow's signal than yours.

Q. He was following your signals that morning, wasn't he?

A. He was supposed to." (Tr., pp. 61, 62).

The alleged defective couplers were the excuse he invented for giving that signal, and the excuse fell with the withdrawal of the charge respecting the couplers, and this evidence was withdrawn. Again, the condition of the couplers was the excuse for his going between the rails and taking hold of the knuckle

with his hand, but this excuse and this evidence are likewise withdrawn and abandoned. Any other holding than that the foregoing evidence was necessarily withdrawn and abandoned, with plaintiff's withdrawal of the charge of negligence respecting the couplers, would be preposterous.

In *Artz v. C., R. I. & P. Ry. Co.*, 34 Ia. 154, the Court said:

> "But it is urged by appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not, and this testimony shows that he was not guilty of contributory negligence, or at the very least it made it a question of fact for the jury. The difficulty, however, with this position is that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes therefore no conflict. Suppose the fact is conceded that the sun is shining bright and clear at a specified time, and a witness having good eyes, should testify that, at the time, he looked and did not see it shine, could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity, and possibly even he may testify to it with the self-consciousness of integrity, but after all, in the very nature of things, it cannot be true,

and hence cannot, in the law, form any basis for a conflict upon which to rest a verdict."

As suggested by the Court in the foregoing case, plaintiff may have been told that it was necessary for him to say that the couplers were defective, and therefore he gave the engineer a stand-still signal; that because they were defective he went in between the rails to life the pin and adjust the knuckle. He may have thought of these things with a desire that they be true; he may have made himself first believe that they were true, and this belief may have ripened into a conviction of their verity; and, possibly, even he may have testified to them with the self-consciousness of integrity. But after all, in the very nature of things, having conceded that the couplers were not defective, they cannot be true, and hence cannot, in law, form any basis for a conflict upon which to rest a verdict, or furnish the basis for any evidence reasonably tending to support the verdict.

We submit further, that from the evidence of plaintiff and other witnesses, and from the physical facts proved, there was no necessity for plaintiff to have given a stand-still signal, and no necessity for him to have gone in between the rails; and that he was not injured at the place he claims, or in the manner he claims.

There was no necessity for him to have given the stand-still signal.

First. Because he admits that the couplers were not defective.

Second. Because he had not tried to operate the coupler on the car that struck him, and he had no reason, therefore, to believe that it would not operate by the use of the lever.

The Court will bear in mind the fact that just prior to the accident the engine pushed a string of cars in on the stave mill track; that plaintiff rode the cars in on this track, cut off those that were to be left on the track, and then claims to have given the engineer a go-ahead signal; that the engine was to go back on the passing track, clear the switch, and then back east and couple on to a string of stationary cars. Plaintiff claims to have ridden the rear car a short distance as the engine started to leave the stave mill track, and says he then dropped off and walked diagonally across to the stationary cars on the passing track; that he tried to operate the coupler on the west car of the string, and that he was unable to do so. Continuing, he says:

"Q. Then what did you do?

A. I turned around, facing the west on the north side of the passing track, **and gave the engineer the stop signal.**

Q. Where was he then?

A. He was in the cab.

Q. I mean where was the train, east end of the train?

A. When I gave him the stop signal the train was just pulling through the switch; the hind truck of the car was just about half way over the switch.

Q. You mean where the track connects with the passing track?

A. Yes, sir; **and it takes some time to stop there,** and by the time he stopped he was somewhere between four to seven feet, to the best of my judgment, west of the spur switch.

Q. West of where the spur——

A. Intersects the passing track.

Q. Then what did you do?

A. **I gave him the stop signal and I walked on up—it wasn't but about three steps or something like that—and lined up the switch**" (Tr., p. 45).

When he lined up the switch he had no reason to suspect or to believe that the coupler on the car that ran over him would not work. Therefore, no occasion had arisen requiring him to give an unusual and extraordinary signal. The usual and customary thing for him to have done would be to give a back-up signal as soon as the switch was lined up, and, while the engineer was reversing the engine and starting back, to cross the track ahead of the car and operate the lever from the south side as the car moved along. **This is unquestionably what he attempted to do, but he evidently slipped and fell between the rails and was overtaken by the car before he could get in the clear.**

Three. Because if he had given any such signal the

engineer would have seen it, since plaintiff says the engineer was looking at him, and Robinson, a witness called by plaintiff in rebuttal, says the engineer was looking toward Brown.

No necessity existed requiring that plaintiff should have gone in between the rails to operate the coupler with his hand.

On cross-examination, respecting his movements after lining up the switch, plaintiff says:

> "Q. You say you gave him this stop signal and then immediately went around behind the car?
>
> A. Yes, sir.
>
> Q. What was the first thing you did after you went in?
>
> A. Taken hold of the lifting pin on the south side of the car.
>
> Q. Did you go across the track?
>
> A. No, sir; practically across.
>
> Q. And you stood on the track and reached over for the lever, like this?
>
> A. I suppose you would call it reaching; I was partially on the south side of the track (Tr., p. 62).
>
> * * * * * * * *
>
> Q. So you go out to the south side of the track and while still on the track grasp the knuckle with the left hand?
>
> A. Yes, sir.
>
> Q. And then grasp the knuckle with the right hand?
>
> A. Yes, sir.
>
> Q. And while operating the lever with the left

hand you gave the knuckle a pull with the right hand?

A. Yes, sir.

Q. And just then you heard the car coming?

A. Yes, sir.

Q. And immediately then you started to get off the track?

A. Never did get to make a start, only in my mind" (Tr., p. 62).

From the foregoing testimony it will be observed that plaintiff stepped between the rails, facing west, placed his left hand on the lever and his right hand on the knuckle and was in the act of lifting the pin when the cars started moving. **He had not tried to operate the coupler by using the lever while standing south of the track in a place of safety; and there being no evidence that he could not have operated it in that manner, no necessity existed requiring him to go between the rails.** It is possible that plaintiff was doing just what he says he was doing when he heard the cars start to move; but, if he was, he had given no spot or stand-still signal, and had carelessly stopped to operate the coupler in that manner, and in attempting to get out from between the rails, slipped and fell. In any event, he was in a place where he had no business to be, and in placing himself there, he assumed the risk of being injured.

Plaintiff says when he gave the engineer a stop signal that the rear trucks of the last car were about half

way over the switch, and that it takes some time to stop there; that the east end of the car was from 4 to 7 feet west of the switch where it stopped. He also says that from the west end of the stationary string of cars to the switch was about three steps, or something like that. This would make the two cars that were to be coupled together, about 13 to 17 feet apart, estimating his three steps at 9 feet. He also says that when he heard the cars coming he stepped to the left, which would have been south; that he was struck and knocked down, and rolled over once and his foot was caught, the truck passing over it; and that he removed his foot before the next truck struck it. If the car were from 4 to 7 feet west of the switch, then plaintiff was struck that far west, because he did not step east when he attempted to get away; and, from his own description of what happened, he could not have been east of the switch when the car ran over him. But the undisputed testimony shows that he was injured at a point from 20 to 25 feet east of the switch. It also shows that the space between the two cars that were to be coupled was from 100 to 160 feet; that the car that struck him had moved from 25 to 30 feet before striking him; thereby showing conclusively that **plaintiff did not stop immediately behind the car as it stood still, from 4 to 7 feet west of the switch; but that he must have been walking along ahead of the car and fell between the rails, and could not get out of the way until he was run**

over. Chamberlain says the cars were standing about 3 or 4 car lengths apart, which would be from 120 to 160 feet apart, estimating the length of the car at forty feet. The conductor says that, after Brown got hurt and the cars were stopped, they were from fifty to seventy-five feet apart (Tr., p. 102). N. E. Jacques says that after the accident the cars stood about 150 feet apart (Tr., p. 121). The engineer thinks he had moved the cars back about four car lengths, after starting, before he stopped. This evidence shows that the cars were moved a considerable distance, after starting, and that they must have been from fifty to one hundred feet apart, even after the accident.

Again, there was no blood found except at one point on the rail and then a pool just south of that point on the ground. The conductor says the blood on the rail was from twelve to thirteen feet east of the switch point (Tr., p. 98). Godbold places it at from fifteen to twenty feet east of the switch point (Tr., p. 114). Jacques says it was from twelve to fifteen feet east (Tr., p. 121). D. M. Baldwin measured the distance with a tape line and says that the blood on the rail was ten and one-half feet east of the switch point (Tr., p. 131). The switch point being fifteen feet east of the switch stand, would make the distance from the stand twenty-five and one-half feet, plus four to seven feet, which would make the distance from where the car was standing twenty-nine and one-half to thirty-three

and one-half feet to the point where plaintiff was injured.

The foregoing evidence shows conclusively that plaintiff **was not standing at the end of the car from four to seven feet west of the switch when he was struck, but that he was walking along down the track, and was overtaken by the cars, after he had slipped and fallen.** This evidence also corroborates the evidence of Godbold and Chamberlain as to what actually took place. Godbold says Brown rode the cars out from the stave mill track up to the switch, and that he dropped off there (Tr., p. 112). Godbold also says that the west end of the stationary cars was four car lengths east of the switch. It would have been the natural and customary thing for Brown to ride them out. His duty was to follow the engine; the switch had to be thrown. Why, therefore, would he have gotten off the cars and gone from 100 to 200 feet east of the stationary cars, and then walked back the same distance to throw the switch? It is unreasonable. His whole story, predicated upon the defective couplers, as the excuse for his action, as carefully prepared as it is, sounds absurd and unreasonable, as applied to practical railroading. But, with the defective couplers out of it, it is wholly unbelievable. Chamberlain says that Brown gave him a stop signal, lined up the switch, and then gave him a back-up signal, and passed in behind the cars, going across the track; that he saw nothing more

of him until after he was hurt. Again, plaintiff says he slipped and fell, and was run over. He made this statement to Baird, the fireman (Tr., p. 95); also to Godbold (Tr., p. 115) to Pierce, the conductor (Tr., p. 119), and also to Jacques (Tr., p. 119). Also, in a written statement made in July. But on the witness stand he said he was knocked down.

From the foregoing facts disclosed by the record it clearly appears that **the plaintiff had placed himself in a position of known danger, and in so doing conclusively assumed the risk of injury incident to such position.**

Plaintiff's case was submitted to the jury under the provisions of the Employers' Liability Act alone, and the defense of assumption of the risk was therefore available to the defendant.

Grand Trunk R. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838;

Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564;

Mondou v. N. Y., N. H. and H. R. Co., 223 U. S. 1, 56 L. Ed. 327;

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062.

But the Supreme Court of Oklahoma, in its opinion herein, says (Tr., p. 179):

> "Since defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an Act of Congress, the rule seems to be that

> the assumption of risk is not a defense, and were it not for the fact that both parties tried the cause upon the theory that assumption of risk was a proper defense, the Court would not have been warranted in submitting this issue to the jury. The fact that the Court may have committed error in charging the jury on this point, under such circumstances, would not warrant a reversal. Inasmuch as we hold there is no substantial error in the Court's instruction affecting the defendant's right, it is not necessary to enter into an elaborate discussion of this proposition."

The foregoing is in conflict with the holding of this Court in the cases above cited.

In the opinion of the Supreme Court of Oklahoma it is also held (Tr., p. 178):

> "It is next insisted that the Court should have directed a verdict for the defendant, for the reason, it is claimed, that the testimony conclusively shows that plaintiff's injury was due to an assumed risk. It is insisted that this cause of action, having been based upon the Federal Employers' Liability Act, it superseded the provision of our Constitution, and therefore is a question of law for the Court to determine and in this case should not have been left to the jury. We have examined the evidence carefully and are of the opinion that the Court did not err in refusing to instruct the jury to return a verdict for the defendant. Under the general law, and independent of the provision of our Constitution, where the question of assumption of risk depends upon a controverted issue of fact, it is a

question to be submitted to the jury, like all other questions of fact. There was sufficient testimony before the Court and jury to warrant the Court in submitting the issue of the assumption of risk to the jury and the trial court having approved their verdict, it will not be disturbed by us."

This conclusion of the Supreme Court of Oklahoma is predicated upon its previous conclusion respecting the evidence as to the condition of the couplers, which we contend was withdrawn from the jury when the charge of negligence respecting the condition of the couplers was abandoned. The Court said (Tr., p. 174):

"The 3rd, 4th, 11th and 13th assignments challenge the action of the Court in overruling the demurrer to the evidence and overruling the motion for a directed verdict. The basis of defendant's contention is that when the Court, at the request of plaintiff, withdrew from the consideration of the jury that part of his cause of action relating to defective couplers plaintiff thereby withdrew from the consideration of the jury all testimony relating thereto, and hence the effect of which was to leave the case in such condition to show that plaintiff was guilty of contributory negligence and that all of his testimony bearing upon his cause of action, under the employers' liability law, is unreliable and should not be given any weight. It is contended that the only logical conclusion is that in withdrawing from the consideration of the jury his cause of action, based upon defective couplers, after he had testified, is a conclusive ad-

mission on his part that the testimony given by him relating to his cause of action under the employers' liability law was false, and hence leaves no reliable testimony for the consideration of the jury tending to sustain his cause of action. In this conclusion we are unable to agree. These things may materially, but not necessarily, affect plaintiff's credibility as a witness, and the weight which might otherwise be given to his testimony, certainly it does not necessarily follow that his testimony is, as a matter of law, false. Had he only alleged a cause of action under the employers' liability law his testimony as to the defective couplers would have been competent for the purpose of showing a state of facts which justified him in going between the cars, where he claimed he was at the time he was injured. This testimony would have been proper for the purpose of showing that he did not contribute to his own injury. Instead of this being conclusive proof that his testimony upon this point was false, or that he was mistaken in the couplers being defective, it may be that this part of his cause of action was withdrawn from the consideration of the jury by his counsel over his protest and while still contending that the couplers were in fact defective. If only one cause of action had been alleged, as we have shown, it would have been perfectly proper for the plaintiff to have testified to the defective condition of the couplers, justifying his conduct in being between the cars at the time of the injury as tending to show that he was not guilty of contributory negligence."

At plaintiff's request the trial court charged the jury as follows:

> "You are further instructed that the plaintiff has abandoned and withdrawn the claim **that plaintiff's injuries were caused, in whole or in part,** by failure of the defendant to equip its cars with couplers and safety appliances as required by the Act of Congress of March 2, 1893."

This is not only an admission that the couplers were in good condition and operative, but it is vastly more than that. **Plaintiff states emphatically, without qualification or reservation, that the condition of the couplers was not responsible for his injuries, directly or indirectly, in whole or in part. He admits and confesses that, in so far as the condition of the couplers was concerned, it was not necessary for him to have gone in between the rails to operate them, and not necessary for him to have given the unusual and extraordinary "spot" or "stand-still" signal.**

To illustrate: A man is charged with murder. It is admitted that he shot his victim. He interposes a plea of self-defense, gones on the witness stand and swears that his victim attacked him with a large knife, and describes it in detail; describes how he was being pursued by his victim, and, when he was finally driven into a corner, he fired the fatal shot to save his life. Then, after the evidence is all in, he withdraws his plea of self-defense. What is the result? **The withdrawal of**

the plea of self-defense is an admission that his victim had no knife; that he was not being pursued by him; and that he did not shoot to save his own life. If the withdrawal of the plea of self-defense is not an admission that the evidence in support of it is untrue, the withdrawal of the plea, in any event, withdraws the evidence; and the accused, in so far as that plea is concerned, is left without an excuse for the killing of his victim.

From the foregoing facts, and under the authorities cited, it follows that the trial court erred in refusing to direct a verdict for the defendant, as prayed (Tr., p. 147); and that the Supreme Court of Oklahoma erred in holding that the trial court did not err in refusing to direct such verdict (Tr., p. 178). This denies defendant a right arising under the Federal Act.

It is the duty of the trial judge to withdraw the case from the jury and to direct a verdict, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Choctaw, O. & G. R. Co. v. Laura McDade et al., 48 L. Ed. 96;

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 496, 35 L. Ed. 213, 11 Sup. Ct. Rep. 596;

Phoenix Mut. L. Ins. Co. v. Doster, 106 U. S. 32, 27 L. Ed. 65, 1 Sup. St. Rep. 18;

Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840;
Randall v. Baltimore & O. R. Co., 109 U. S. 478; 27 L. Ed. 1003, 3 Sup. Ct. Rep. 322;
Schofield v. Chicago, M. & St. P. Ry. Co., 114 U. S. 615, 29 L. Ed. 224, 5 Sup. Ct. Rep. 1125;
North Penn. R. Co. v. Commercial Natl. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. Rep. 266.

That plaintiff assumed the risk of dangers ordinarily incident to his employment as brakeman we assume will be conceded and for that reason we shall not enter upon a discussion of this proposition, but we shall simply invite the attention of the Court to a few authorities.

In *Narramore v. Cleveland, C. O. & St. L. Ry. Co.*, 96 Fed. 298, it is said:

> " 'Assumption of risk' is a term of the contract of employment express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to

protect him from dangers, the risk of which he agreed expressively or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk and is well supported by the judgments of Lord Justices Bowen and Dry in the case of *Thomas v. Quartermaine*, 18 Q. B. Div. 685, 695. See, also, language of Lord Watson in *Smith v. Baker* (1891), App. Cas. 325, and *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161."

Sans Bois Coal Co. v. Janeway, 99 Pac. 153, 32 Okl. 425;

Coalgate v. Hurst, 25 Okl. 588, 107 Pac. 657;

Tuttle v. Detroit G. H. & M. Co., 122 U. S. 189, 30 L. Ed. 1114;

Kohn v. McNulty, 147 U. S. 241, 37 L. Ed. 152;

South. Pac. Ry. Co. v. Seeley, 152 U. S. 153, 38 L. Ed. 395;

Morris v. Duluth S. S. & A. R. Co., 108 Fed. 747;

Gilbert v. Burlington C. R. & N. C. Co., 128 Fed. 529;

Choctaw, Etc., R. Co. v. McDade, 191 U. S. 64;

William v. Choctaw, Oklahoma & G. R. Co., 149 Fed. 104;

Burke v. Union Coal & Coke Co., 157 Fed. 178;

Washington, Etc., Co. v. McDade, 135 U. S. 554.

That plaintiff assumed the risk of obvious dangers, such as stepping between the rails in front of a moving train, or in attempting to couple cars, or to prepare the train for coupling, by standing between the rails, and the like, is equally as well settled and needs no citation of authorities in support thereof.

In *Seaboard A. L. Ry. Co. v. Horton*, 233 U. S. 492, *supra*, this Court, respecting the assumption of risk, say:

> "Some employments are necessarily fraught with danger to the workman—danger that must be confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this Court. Choctaw, O. & G. R. Co., v. McDade, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep, 230; Schlemmer v. Buffalo, R. & P. R. Co., 220 U. S. 590, 55 L.

Ed. 596, 31 Sup. Ct. Rep. 561; T. & P. Ry. Co. v. Harvey, 228 U. S. 319, 57 L. Ed. 852, 33 Sup. Ct. Rep. 518; Gila Valley G. & C. R. Co. v. Hall, 232 U. S. 94, 102, *ante* 521, 34 Sup. Ct. Rep. 229, and cases cited."

Plaintiff does not claim to know at what point on the track he was injured, but he does say that the rear car attached to the engine stopped from four to seven feet west of the switch-stand; that he stepped in behind this car, and that as he was adjusting the knuckles he heard the slack being taken up and attempted to get out of the way; that before he could do so the car struck him, and he was knocked down. If this statement be true, he must have been injured west of the switch-stand, but the physical facts, as testified to by all of the train crew, and which are not controverted, show that he was injured from ten to fifteen feet east of the switch-stand (Tr., p. 144), which shows conclusively that he must have been walking along the track ahead of the moving cars, and fell, or that he was overtaken and knocked down by the cars. In either event he assumed the risk of being injured by placing himself in so perilous a position, and defendant's motion to direct a verdict should have been sustained. It is submitted that for this reason the State Supreme Court erred in affirming the judgment.

VII.

The Supreme Court of Oklahoma erred in holding that instruction No. 13, given by the trial court to the jury, was not erroneous (Tr., p. 11); **said instruction being quoted in full under this assignment of error, at page 25 herein.**

XI.

The Supreme Court of Oklahoma erred in holding that the trial court did not commit error in refusing to give to the jury instruction No. 12, requested by defendant (Tr., pp. 12, 13); **said instruction being quoted in full under this assignment of error at page 20 herein.**

If plaintiff was entitled to recover at all his recovery should have been measured by the standard prescribed by the Act of Congress under which his action was prosecuted. But the trial court, we submit, failed to give the jury any standard by which to measure his damages.

In *Seaboard Air Line Ry. Co. v. Tilghman*, 237 U. S. 498, 59 L. Ed. 1069, it is held:

> **"Damages — Diminution — Comparative Negligence.**
>
> "1. The direction in the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sections 8657, 8659), Section 3,

that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employe, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.

"Trial — Instructions — Damages — Comparative Negligence.

"2. Proper effect is not given to the provisions of the Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Section 8657, 8659), Section 3, that contributory negligence of the employe shall not bar a recovery, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe, by an instruction leaving to the jury the matter of diminishing the damages in such case, without naming any standard to which their action shall conform other than their own conception of what is reasonable."

In the body of the opinion it is said:

"No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employe with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed

to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made, and the jury should have been advised of that rule and its controlling force."

While it is true that the trial court instructed the jury in practically the language of the statute with the substitution of the word "reduce" instead of "diminish", yet the Court failed to define the meaning of the word "proportion" and failed to define or fix any standard by which the damages should be measured. The instruction given (No. 13) falls within the character of charges condemned by this Court in *Seaboard Air Line v. Tilghman, supra.*

This Court has frequently referred to reports of committees and debates in Congress to ascertain the intention of Congress in passing an act. In this connection it will be observed that the report of the Committee of the Judiciary of the House of Representatives, dated April 4, 1908 (60th Congress, First Session, Report No. 1386), to accompany H. R. No. 20310, which, in so far as section 3 is concerned, is the same as the Act of April 22, 1908, quoted authority to the effect that section 3 "is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice if juries could

be trusted to act upon it." Further, at page 4 of the act, it was said:

> "We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. * * * Comparative negligence is absolutely wrong in principle. * * * We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employe to recover full damages for injury to which his own negligence contributed in some degree."

It may thus be fairly contended that it was the intention of Congress to reject the doctrine of comparative negligence and to adopt the admiralty rule. That such was the intention of Congress is clearly apparent from a comparison of the two acts; that is, the Act of June 11, 1906, with that of April 22, 1908. In section 2 of the former act it is provided:

> "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury."

In section 3 of the latter act it is provided:

> "The fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

The first act clearly provides for the rule of "comparative negligence"; and it is equally clear that the last act provides for the "admiralty rule". It would seem, however, that the House Judiciary Committee had some doubt as to the ability of juries to apply the "admiralty rule" and we submit that, without some explanation of its application, juries ought not to be permitted to guess what Congress meant.

The instruction in the instant case is objectionable, because the Court did not instruct the jury as to the meaning of the word "proportion" as used in the statute, respecting the damages which plaintiff was entitled to recover in the event the jury should find that plaintiff was negligent and that his negligence contributed to his injury. Also, in that it invited the jury to apply the doctrine of comparative negligence in assessing plaintiff's damages, which is not the measure of damages prescribed by the statute.

This instruction had its exact replica in an instruction passed upon by the Supreme Court of Kentucky in the case of *Nashville Railroad Co. v. Banks*, 161 S. W. 554. The instruction in that case was numbered four,

and appears in full at page 556 of the opinion, and is in full as follows:

> "Although you may believe from the evidence in this case that defendant was guilty of negligence on the occasion complained of, and as defined to you by instruction No. 1 herein, yet if you shall further believe from the evidence that plaintiff was also guilty of negligence in the performance of his duties as brakeman at the time complained of by him, then he is chargeable with contributory negligence, and if you shall believe from the evidence in this case that plaintiff was guilty of negligence as mentioned to you in this instruction, and that such negligence on his part contributed to bring about the injuries to him and but for which he would not have been injured, then you will diminish the damages, if any, you may assess in his favor, in proportion to the amount of negligence, if any, attributable to him in causing or producing the injury complained of by him."

The holding of the Court on this instruction is indicated by the fourth paragraph of the syllabus quoted herewith:

> **"Negligence (S. 101*)—Injury to Servant—Contributory Negligence — Federal Employers' Liability Act.**
>
> "Under the Federal Employers' Liability Act (April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322), declaring that contributory negligence shall not bar a recovery, but the dam-

age shall be diminished in proportion to the negligence of the injured employe; an employe sustaining a personal injury cannot recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the railroad company bears to the entire negligence attributable to both, and an instruction that, if the employe was guilty of negligence which contributed to his injuries, the jury must diminish the damages in proportion to the amount of negligence attributable to him in producing the injury, is erroneous."

The objection to this instruction is clearly covered in the decision and opinion of the Kentucky case, restated in our own way perhaps not so clearly. The vice of the instruction is, in our opinion, twofold:

First: It invites the jury to apply the doctrine of comparative negligence; and,

Second: It does not give them any intelligent rule by which to assess in the event that the plaintiff's negligence partially produced the accident or contributed thereto. In other words, it says that the jury should diminish the damages in proportion to the amount of negligence attributable to the plaintiff, but it does not say what that negligence shall be in proportion to or what the amount of damages shall be diminished by. Stated in another way, the statutory rule is a rule of proportion, and the instruction does not give the terms of that proportion. Couched in the language of

mathematics, the rule is this: As the defendant's negligence is to the whole negligence (consisting of the negligence of the defendant and the negligence of the plaintiff) so shall the plaintiff's verdict be in proportion to the whole damage suffered by the plaintiff; or the same result is arrived at by a different combination of words, as follows: As the plaintiff's negligence is to the whole negligence so shall the plaintiff's damages be diminished in proportion to the whole damage which he suffered.

The above is squarely the rule of damages obtained and applied in the admirality courts and is not the rule at common law at all. The rule in admiralty courts has been, from the earliest English decisions, that the judges in admiralty will undertake to measure without regard to any stated standards of liability the relative degree of negligence of the parties involved in tort cases, and in so doing they will distribute the damages between such parties on a basis of equity.

Katherine v. Dickerson, 17 How. 170;
Max Morris, 137 U. S. 1;
Atlee v. Packett Co., 21 Wall. 389;
Smith v. Serapis, 49 Fed. 393.

The language which the trial court used in this instruction shows clearly that the Court did not grasp the meaning of the language employed in the act and did not appreciate what Congress was driving at and what Congress was endeavoring to accomplish; and for

that reason failed to use such language as would give the jury an adequate idea of their duties under the statute. The Court no doubt conceived of the statute as putting in effect what is known as the "comparative doctrine of contributory negligence". This is a doctrine which has flourished in but one jurisdiction in this country—Illinois—and has been applied to a limited extent in but two others—Tennessee and Kansas. That the doctrine of comparative negligence is a very different thing from the rule put in force in this act is apparent from the decisions of those states:

C., B. & Q. R. Co. v. Johnson, Admr., 103 Ill. 512;

Calumet Iron and Steel Co. v. Martin, 115 Ill. 358.

In the Johnson case the following instruction of the Court was approved:

> "But if the jury believe from the evidence that Johnson did not exercise ordinary care, yet that Johnson's negligence was slight and that the negligence of the defendant was gross in comparison with each other, then the plaintiff must recover and the verdict must be for the plaintiff."

In other words, under that doctrine it becomes the province of the jury to compare the negligence of the plaintiff and the defendant and if the jury finds that the defendant was negligent and finds that the plaintiff

was negligent, but further upon a comparison of the negligence of the two parties finds that the plaintiff's negligence be slight and that the negligence of the defendant was gross, then, notwithstanding the slight negligence of the plaintiff, the verdict is for him. Under such an instruction and under such a law the jury determines liability by comparison of the negligence of the parties; having determined liability, it then assesses the full damages which the party has suffered, or assesses nothing. There is no half-way or middle ground.

It can thus be seen how very different the rule of comparative negligence, as laid down by the Illinois decisions, is from the rule of diminution of damages as laid down in the Federal Act.

The doctrine of comparative negligence, as held in the Tennessee courts, has exemplification in the following cases:

Whirley v. Whiteman, 1 Head Rep. 623;
Railroad v. Humphreys, 12 Lea. 200;
Railroad v. Fleming, 14 Lea. 130;
Railroad v. Fain, 12 Lea. 35;
Railroad v. Gurley, 12 Lea. 46.

The Kansas cases are as follows:

Kansas R. R. Co. v. Peary, 29 Kans. 169;
Railroad v. Morgan, 31 Kans. 77;
Railroad v. Henry, 57 Kans. 154.

There are therefore for consideration by the courts the three distinct rules covering contributory negligence:

(1) The common-law rule wherein the slight contributory negligence on the part of the plaintiff bars recovery completely.

(2) The comparative rule of contributory negligence permits the plaintiff to recover full damages if the negligence, as compared with the negligence of the defendant, is slight and the defendant's negligence is gross.

(3) The admiralty rule of contributory negligence that in no event shall the contributory negligence of the plaintiff bar recovery, but that his contributory negligence shall be considered and its proportion to the entire negligence determined in order that the proportion of the damages which the party shall assume may be determined, each party bearing such proportion of the damages as each party's negligence bears to the whole.

It is submitted that defendant's requested instruction No. 12 (Tr., pp. 12, 13) fairly defined the rule to be followed, and its refusal was error.

But, in the case at bar, we have practically a "quotient verdict". Mr. Best, foreman of the jury, testifying in support of defendant's motion for a new trial, said:

"Q. Having reached a conclusion that the

plaintiff should recover, then what method did you adopt to find the amount?

A. The question was put to each man who was a member of that jury, the amount. This one said so much, this one so much and this one so much and so on around, until we passed to the twelve, each man stating the amount that he thought he ought to recover.

Q. Who asked that? You, as foreman?

A. Yes, sir.

Q. All right; go ahead.

A. And after the question had gone around and I had put the amounts of each man on the paper—I wasn't asked to do that, but I just wanted to see how the jury stood on it; and after we got through some member of the jury asked me if I was making a notation of the amount each one stated that should be recovered. I said yes. He asked me to state what it aggregated. I summed up and it aggregated $16,900.

Q. You mean the total sums added together gave you $16,900.00?

A. The total sums added together and divided by twelve.

Q. The total amounts added up and divided by twelve made after the division——

A. $16,900.00.

Q. That was the amount of the verdict returned, was $16,900.00?

A. Yes, sir" (Tr., p. 160).

It would seem from the foregoing and from the testimony of the foreman of the jury that the amount of

plaintiff's recovery was arrived at by means of a quotient verdict rather than by the rule provided in the Act of Congress under which the case was prosecuted, and this method is clearly unauthorized.

From the facts disclosed by the record, and under the authorities cited herein, we respectfully submit that the judgment of the Supreme Court of Oklahoma should be reversed, annulled and held for naught.

Respectfully submitted,

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March 11, 1916.

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In the Supreme Court of the United States

October Term, 1915.

St. Louis & San Francisco Railway Company,
Plaintiff in Error,
vs.
Harry A. Brown,
Defendant in Error.

No. 399

In Error to the Supreme Court of the State of Oklahoma

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

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ARGUMENT

I.

The court did not err in instructing the jury that nine jurors could return a verdict.

The constitutional question having been argued in a general brief herein filed, we pass that ques-

tion with the statement that in the trial court, in the instant case, no contention was made that the court did not have jurisdiction of the cause. The only way in which the question was presented 6 - the trial court was by a general exception to paragraph 19 of the court's charge which told the jury that as many as nine jurors could reach a verdict.

II.

The court did not err in refusing to direct a verdict for defendant upon the ground that plaintiff had assumed the risk.

The first, fourth, fifth and sixth assignments of error are, by the plaintiff in error, grouped under one argument, and, in the aggregate, present the claim that when the plaintiff below abandoned that count of his cause of action which was based upon the Safety Appliance Act, he necessarily withdrew from the consideration of the jury all testimony which had been introduced tending to show the defective condition of the car couplings. Based upon this assumption, the contention is that the State court held that the law of the assumption of risk was not available as a defense to the action. The plaintiff alleged two distinct grounds as a basis of recovery. It was charged: First. That, while engaged in interstate commerce, the

plaintiff stepped in between the rails of defendant's railway for the purpose of adjusting the knuckle on the coupler, after first having given the engineer a signal, not only to stop, but to hold the engine, until the coupler could be adjusted; and that while engaged in the discharge of such duty, the engineer, without warning, started the cars in motion, which knocked him to the ground and injured him; and, Second. That the couplings of the cars were defective in that they were not such as required by the act of Congress. After the introduction of the testimony the plaintiff abandoned his right to recover under the Safety Appliance Act, and went to the jury upon the count which was based upon the Employers' Liability Act.

The evidence which was introduced tending to show the defective condition of the couplers was not by the court withdrawn from the jury and no request was made by the defendant to have the same withdrawn. The somewhat surprising claim, however, is now made that, *as a matter of law*, the evidence which had been introduced going to show the defective condition of the couplers was automatically withdrawn, and that this being so the plaintiff had assumed the risk, and the

court should have charged the jury to return a verdict for the defendant. The contention is so patently unsound as to be difficult of argument. If the suit had been primarily based solely upon the Employers' Liability Act, and no reference had been made to the Safety Appliance Act, confessedly, the testimony as to the defective couplings would have been admissible for the purpose of justifying the plaintiff in going between the rails of the track for the purpose of adjusting the coupling.

The contention of the defendant that the plaintiff should have remained entirely off the track and managed the couplings by using the lever, and that in failing so to act he was guilty of contributory negligence, would have been met by evidence that the lever would not lift the coupling, and that it became necessary to go between the rails for the purpose of making the adjustment. This testimony as to the defective coupling was competent, whether the defendant proceeded upon the Employers' Liability Act or upon the Safety Appliance Act. It is impossible to understand how the testimony became incompetent to support the first count of the complaint because the plaintiff abandoned the second count and proceeded

just as though the cause of action had been based originally upon the Employers' Liability Act alone.

If the plaintiff in error's assumption with reference to this question is unsound, then necessarily its further contention that the State court committed error with reference to the doctrine of assumption of risk falls to the ground. It is contended that the State court held the defendant below could not interpose the defense of assumption of risk. This assignment is based upon a misconception of the record. In the eighteenth paragraph of the court's charge the doctrine of assumption of risk was expressly submitted to the jury (Tr. 153). This latter contention of the plaintiff in error is based upon a statement by Justice Riddle of the State Supreme Court, that the trial court would have been justified in refusing to submit the question of assumption of risk to the jury. The opinion of the State Supreme Court discloses the fact that in that court the plaintiff in error was making a contention which is abandoned in this Court, that is: It was there claimed that the last clause of the eighteenth paragraph of the court's charge, wherein the jury was told that the plaintiff did not assume the risk that resulted from negligence of a fellow servant,

was error. It was in answer to this contention that the learned justice in the State court used the language which it is now contended ought to reverse this case. This contention entirely overlooks the fact that the trial court distinctly submitted to the jury the doctrine of assumption of risk. The most that can possibly be said of the language of the State Supreme Court, which is so criticised, is that it was dictum.

In these four assignments of error which we are now considering it is claimed in a general way that the testimony conclusively shows that the defendant was not guilty of negligence, but that the plaintiff was guilty of such contributory negligence (which is erroneously discussed as assumed risk), as to make it the duty of the trial court to instruct a verdict for the defendant. It is confessed here (though denied in the State court) that at the time of the injury, plaintiff below was assisting the defendant in interstate commerce. It not being necessary, therefore, for this Court to examine the evidence to determine whether or not the cause of action was supported by the Employers' Liability Act, it is not believed that this Court will review the testimony for the purpose of determining whether or not the defendant was guilty of

negligence or whether the plaintiff was guilty of contributory negligence. These questions of fact were submitted to the jury upon conflicting testimony, and being questions of general law, and not essentially Federal in character, are not before this Court for determination.

But will this Court review the action of the State Supreme Court wherein it held that the plaintiff below, in dismissing that portion of his complaint which was based upon the Safety Appliance Act, did not withdraw from the jury all the testimony he had introduced with reference to the defective coupling? Is any Federal question here involved? Certainly it did not involve the construction of any act of Congress. It was rather a question of general law depending for its solution upon local construction. It was merely incidental to the Federal questions involved in the case and did not, in its essence, involve the existence either of plaintiff's right to recover under the Federal statute or of the defendant's right to be ~~shielded~~ shielded under that statute.

Sea Board Air Line Ry. Co. v. *Padgett*, 236 U. S. 668.
Central Vermont Ry. Co. v. *White*, 238 U. S. 507.
Sea Board Air Line Ry. Co. v. *Duvall*, 225 U. S. 477.

But, however this may be, the testimony was of such a nature that it was impossible for the trial court to withdraw the case from the jury. The plaintiff below testified that after detaching certain cars from a string of cars attached to the engine, he moved over to another track upon which certain cars were standing, and undertook to adjust the coupling at the end of the car nearest to the cars attached to the engine, which were to be backed up and coupled on to the standing cars. He says that he found that the lever would not lift this coupling, and that he then adjusted it with his hand (Tr. 44). He then followed up a short distance in the direction of the engine and the cars attached thereto, turned the switch so that the way would be clear to go back and couple on to the stationary cars. He then gave the engineer a signal to stop the moving cars. This signal was observed and the cars brought to a standstill. He then gave the engineer what he called the "spot signal." That signal meant that the engineer was not to start the cars until he received a signal so to do. When he saw that the engineer had observed his "spot signal," he went on south to go across the track for the purpose of lifting the pin on the end of the car which

was to be pushed back and coupled and fastened to the coupling of the other car which he had adjusted. Having seen that the engineer had observed his "spot signal," he approached the car where he was to use the lifting pin or lever and took hold of it for the purpose of working the knuckles. He saw that it woudn't lift the knuckle, and then, while holding this lever or lifting pin with his left hand, he took hold of the knuckle with the right hand to open it so that by impact it would couple on to the stationary car which had been first adjusted while in this position. He heard the slacking of the cars attached to the engine, and realizing that the cars had been put in motion he tried to escape from the track (Tr. 45-46). It will be seen that the plaintiff testifies that before he went on the track he saw that the engineer had received his "spot signal" (Tr. 46). He testified also that he was attempting to adjust the knuckle in the usual and customary way (Tr. 71). The only testimony contradicting the plaintiff is that of the engineer, Chamberlain, who agrees with the plaintiff that upon signal he stopped the train. He says he then received the "back up" signal and started the cars back, which resulted in the injury (Tr. 89-90). The only two

witnesses, therefore, upon this question were the plaintiff and Chamberlain, both agreeing that the "stop signal" was given and obeyed, the plaintiff contending that the "spot signal" was given and disobeyed, Chamberlain contending that instead of the "spot" signal, the "back up" signal was given. It is possible that the engineer mistook the "spot" signal for the "back up" signal.

In any event, this conflict was resolved by the jury in favor of the plaintiff. It being established, therefore, that when the plaintiff stepped in front of the car, which was standing still, he believed that the engineer had received his "spot" signal, he had a right to assume that the car would not be put in motion; and this Court cannot say, therefore, as a matter of law, that he was guilty of contributory negligence in attempting to adjust the knuckle, which would not work by using the lever, and which could not be reached without the plaintiff stepping between the rails. Much stronger cases of contributory negligence have been by this Court left where the jury left them. In the case of *Minneapolis, St. Paul, Etc., Ry. Co.* v. *Popplar*, 237 U. S. 369, the servant stepped between two cars which were moving at the rate of four miles per hour, in order to undo the

coupling by hand, when he was run over and killed. See also *Grand Trunk Ry. Co.* v. *Lindsay*, 233 U. S. 42. Apparently the evidence tending to show negligence upon the part of the plaintiff there was much stronger than the testimony in the instant case, but the judgments were affirmed. In the case of *Sea Board Air Line Ry. Co.* v. *Beauregard, Magdalene Konnecke, Etc.*, decided on December 13, 1915, this Court indicated that upon all questions of fact not essentially Federal in character it would not disturb the finding of the jury. In the case of *Kanawah & M. R. Co.* v. *Kerse*, decided on January 10, 1916, this Court says:

> "The burden of proof of assumption of rick was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses and free from contradiction, the trial court could not be charged with error in refusing to take the case from the jury."

Moreover, we believe that the doctrine of assumption of risk has no place in the case, and that what plaintiff in error is really contending for is: That the defendant in error was guilty of such contributory negligence as to defeat his right to recover. It is not always easy, of course, to distinguish between contributory negligence and

assumed risk, but it seems that there ought to be no difficulty in this case. In Section 4611, Volume 4, of Thompson on Negligence, it is said:

> "Many of the earlier and some of the later decisions confuse the two subjects of an acceptance by the servant of the risk of employment, and his contributory negligence. The two subjects lie close to each other and in some cases blend; but in other cases they are distinct subjects. Nevertheless, the judges frequently use the words, 'an acceptance of the risk,' where they really mean contributory negligence. Let us illustrate this by the every day accident connected with coupling cars. In order to make a coupling the cars must be thrust together either by a locomotive or by a propulsion called 'kicking' or 'shunting,' or by gravity. There is consequently always danger to the brakeman in the operation. If, in making the coupling, he accidentally, and without negligence, slips and falls and passes under the wheel, his injury is ascribed to one of the ordinary risks of employment, which risk he has accepted, and no damages can be recovered for it. But if, instead of using the coupling stick furnished him by the railway company, he undertakes to make the coupling with his hands and in the operation gets his hand crushed, this is contributory negligence, and consequently no damages can be recovered. The distinction between the two cases is that in the former case the brakeman was not guilty of negligence at all; consequently the expression, 'contributory negligence,' could not be properly applied to his act, but what he suffered was from a mere accident attending the known

danger, the risk of which he assumed; whereas in the latter case his own negligence and rashness brought upon him the injury which he suffered."

In Section 4611, Volume 8, the same author says:

"The doctrines of assumed risk and contributory negligence are separate and distinct. The defense of contributory negligence rests on some fault or omission of duty by the plaintiff and may be urged, notwithstanding the negligence of the defendant, while the defense of assumed risk rests on contract, express or implied."

See also:

Sea Board Air Line Co. v. *Horton*, 233 U. S. 492.
Pierce v. *Clavin*, 82 Fed. 550.

III.

The court did not err in instructing the jury as to the effect of contributory negligence, nor in failing to give defendant's requested charge on contributory negligence.

Assignments seven and eleven, argued together in the brief of plaintiff in error, relate to the alleged error of the Supreme Court of Oklahoma in approving Instruction No. 13 given by the trial court, and approving the action of the trial court in refusing to give Instruction No. 12,

requested by the defendant. The instruction given by the trial court was as follows:

"If you should find under the instructions heretofore given you that at the time of the injury to the plaintiff the defendant was engaging in interstate commerce, and that he was injured through the negligence of defendant's engineer, and you should further find that plaintiff himself was guilty of negligence which contributed to his injury, then you are instructed that such negligence on the part of plaintiff would not defeat his right to recover, *but that you should reduce his damages in proportion to the amount of negligence which was attributable to him.*"

The instruction requested by defendant and refused by the trial court was as follows:

"If you find that the plaintiff at the time of the alleged injuries was employed in interstate commerce, as defined in Instruction No. 8, then you are instructed that you will be governed by Section 3 of the Act of Congress of April 22, 1908, U. S. Stat. L., p. 66, which is as follows:

> "'That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that such employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employe.'
>
> "*The statute requires the jury to diminish*

the amount of the recovery if the employe has been guilty of contributory negligence in proportion to the amount of negligence attributable to such employe. It is the duty of the court to instruct the jury on the meaning of the language 'in proportion' occurring in this statute. The word 'proportion' is a general word with a number of different meanings. When such general words are used in a statute we are required to look to the intent and purpose of the statute and the context in which we find the word. *I instruct you that the word is not used to describe a mathematical proportion or relation, but is used in one of its general meanings to indicate or describe a part or share of the total damage which must be attributed to the employe if he has been guilty of contributory negligence. The jury will, therefore, construe the words, 'in proportion,' as used in the statute, to mean such part or share of the total damage in money as may under the evidence be found by the jury to be justly and fairly attributable to the negligence of the employe.*

"You should first consider whether or not the defendant was guilty of negligence and whether or not such negligence was the proximate cause of the injury. If you find either of these propositions in the negative your verdict must be for the defendant. If, however, you find both of them to be in the affirmative, you should next consider whether or not the plaintiff was guilty of contributory negligence as herein defined. If you find he was not, then you must award him such damages as he has sustained by reason of the injuries incurred by him as a result of the defendant's negligence.

"But if you find that the defendant was guilty of negligence and that such negligence was the

proximate cause of the injury, and you further find that the plaintiff was guilty of contributory negligence, then you must determined the whole amount of such damages sustained by the plaintiff and, having done so, you must diminish such damages by deducting therefrom such proportion or just such share thereof as is attributable to the negligence of the plaintiff and the balance remaining will be the amount of your verdict."

Plaintiff in error contends that the instruction given was erroneous, in that it told the jury to apply the doctrine of "comparative negligence," a rule which this Court held, in the case of *Norfolk & Western R. Co.* v. *Earnest*, 229 U. S. 114, 57 L. Ed. 1096, to be a wrong application of the rule prescribed by the Federal Employers' Liability Act of 1908, respecting the diminution of damages on account of contributory negligence on the part of the plaintiff. We deem the opinion in the Earnest case a sufficient answer to this contention. In that case the instruction given by the court was as follows:

> "Contributory negligence is the negligent act of the plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, *but the damages*

shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

"So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, *but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant.* If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence."

It will be observed that the first portion of this instruction is in almost the exact language of the instruction given by the trial court in the instant case. However, the trial court in the Earnest case did not stop with giving this portion of the instruction, but went further, and, in plain terms, stated that the negligence of the plaintiff should be compared with the negligence of the defendant in determining the amount of damages to be given. In commenting upon this language, Mr. Justice Van de Venter said:

"The other criticism deserves more discussion. *The thought which the instruction expressed and made plain was that if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in the proportion to the amount of*

his negligence. .This was twice stated, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant,' there would be no room for criticism."

It is apparent that the Court expressly approved the first portion of the instruction in that case, which is exactly like the instruction given in the instant case. The Court expressly states that had the trial court stopped the instruction at the point reached by the trial court in the instant case, there would have been no room for criticism. It was only because the trial court in the Earnest case, after correctly stating the law to be applied, went further and, by an "unhappy use of words," instructed the jury to *compare* the negligence of the plaintiff with that of the defendant, that the Court held it had misstated the law. It will be observed, however, that this error in the latter part of that instruction was not sufficient to authorize a reversal of the case. It would seem that this opinion is a sufficient answer to the contention of the plaintiff in error. However, a further brief reference may be permissible.

Two cases only are relied upon in the brief.

One of them, *Seaboard Air Line Ry. Co.* v. *Tilghman*, 237 U. S. 498, 59 L. Ed. 1069, and the other, *Nashville Ry. Co.* v. *Banks*, 161 S. W. 554.

It is urged that the trial court should have given the requested Instruction No. 12 upon the authority of these two cases. It will be observed that the first portion of the instruction requested by defendant is in the exact words of the instruction actually given by the court. *The remainder of the requested instruction, however, is based upon the assumption that the rule of proportion to be observed by jurors when undertaking to diminish the damages on account of contributory negligence of the plaintiff is not a mathematical rule, but that by the terms of the statute it is left to the jury to determine what they deem is a "fair and just proportion" of the damages to be deducted on account of the plaintiff's negligence.* This portion of the requested instruction was so erroneous that had the trial court given it over the objection of either party it would have warranted a reversal of the case. In the Tilghman case Mr. Justice Van Devanter, who wrote the opinion in the Earnest case, expressly disapproved an instruction that "if the jury found the plaintiff was guilty of contributory negligence, it should

then determine the full amount of damages and deduct from that whatever amount it deemed proper for his contributory negligence." It was specifically held that such an instruction committed to the jury the matter of diminishing the damages without any other standard than their own conception of what was reasonable.

So, when the plaintiff in error requested the trial court to instruct the jury that the word "proportion," used in the statute, was not used to describe a mathematical proportion, but that the jury should construe the word to mean "such part of the total damage as the jury might find to be *justly and fairly attributable* to the negligence of the plaintiff," it was requesting an instruction which in principle was exactly like the instruction disapproved in the Tilghman case. It seems that the words "in proportion" as used in this statute *are* used in their mathematical sense, and that it was not intended that the jury should be left to determine what they think was a "fair and just" proportion to be deducted on account of the negligence of the plaintiff.

In *Chadwick* v. *Oregon & Washington R. Co.*, 144 Pac. 1165; *Tilghman* v. *Seaboard Air Line*

Ry. Co., 83 S. E. 315, and *Cross* v. *Chicago, B. & Q. R. Co.*, 177 S. W. 1127, State courts have taken this view of the act. The illustration used in each of these cases is, that if the jury should find that both parties were equally negligent, and should further find that the actual damages of the plaintiff were properly assessable at $2,000, then the verdict should be for $1,000, for the reason that the plaintiff's negligence is one-half of the total negligence of both parties. Clearly this is the intent of the statute. Yet, if plaintiff in error's contention be correct, then, though the jury found, in the supposed instance, that the negligenceof each party contributed equally to the damage, the jury, in diminishing the damages in the amount which it deemed "fair and just," would be authorized to fix the damage caused by plaintiff's negligence at $500 and thus give him judgment for $1,500 against the company, or, upon the other hand, it might assess the damages caused by plaintiff's negligence at $1,500 and only give him judgment for $500. In either event the damages would not be assessed in proportion to the amount of negligence attributable to the plaintiff, and the method pursued would fall squarely within the rule condemned in the Tilghman case.

To sustain the contention of plaintiff in error, that it was entitled to have Instruction No. 12 submitted to the jury, would result, necessarily, in leaving with the jury the option to do the very thing which the statute, as construed in the Tilghman and Earnest cases, says it cannot do, that is, apply the doctrine of "comparative negligence." We use the words "comparative negligence" here in the sense that the jury might *compare* the negligence of plaintiff with that of defendant. *We say this because it is apparent that if the jury, after having determined that plaintiff's negligence contributed three-fourths to the entire damages sustained by him, may then determine what is the "just and reasonable proportion" of the damages he has received on account of his own negligence, from their own ideas of what is just and reasonable, then the jury may determine that, according to their idea of what is just and reasonable, all the damage he has received has beencaused by his own negligence, thus in effect applying the doctrine of "comparative negligence" and refusing him any relief, even though the same jury should find that the defendant's negligence contributed one-fourth to his injury.* If the jury, after having determined the ~~proposition~~ proportion of negli-

gence attributable to each party, may then diminish the damages, not according to the mathematical proportion, but according to what the jurors deem "fair and reasonable," then, though they find that the negligence attributable to the plaintiff was only three-fourths of the total negligence attributable to both parties, they may according to their idea of fairness and justness diminish his damages seven-eighths. The unsoundness of such a theory is clearly apparent. Yet this is the theory contained in the instruction requested.

The Banks case is relied upon as sustaining the contention that the instruction as given was erroneous. That case was decided by the Court of Appeals of Kentucky. It will be observed that in the closing part of that opinion the court intimates that the holding as to the validity of the instruction was not entirely due to the form in which the particular instruction itself was given. The court there stated: "The instruction of the court does not conform to the rule thus laid down. It does not in terms state what the amount of negligence attributable to him is to be in proportion to; but, *as in the previous part of the instruction, the negligence of the defendant and his negligence are referred to, we think, the natural*

meaning of the instruction is that the damages are to be diminished in proportion to the amount of negligence attributable to him, and that attributable to the defendant, which, as shown above, is not the construction of the statute adopted by the Supreme Court." It is evident that the court in thus disapproving the form of instruction actually given in the instant case, based its holding largely upon the fact that, taken in connection with other instructions, it believed the court had instructed the jury to apply the rule of "comparative negligence." The Kentucky court thought that its holding was in accordance with the opinion of this Court in the Earnest case. It is clear that the court misconstrued that opinion, and this fact is practically admitted by the same court in the later case of *Cincinnati, N. O. & T. P. R. Co.* v. *Goode*, 173 S. W. 329, where the court, referring to the Banks opinion, says:

> "In *N. C. & St. L. R. R. Co.* v. *Banks*, 156 Ky. 609, 161 S. W. 554; *N. C. & St. L. R. R.* v. *Henry*, 158 Ky. 88, 164 S. W. 310, and *L. & N. R. Co.* v. *Heinig's Admx.*, 162 Ky. 14, 171 S. W. 853, we had under consideration the proper instruction in this class of cases, and in each of these cases we held that an instruction similar to the one given in this case did not conform to the rule announced by the Supreme Court in the Earnest case. *We had*

doubt then, and it may well be doubted now, if the construction we placed on that opinion was correct; but we think it safer practice to now follow the views expressed in these opinions, and accordingly the judgment must be reversed for error in the instruction on the measure of damages.''

The annotators of L. R. A., New Series, 1915, C., in a note to the Seaboard Air Line Railway Company case, on pages 67 and 68 state: "The position of the Kentucky court is not entirely clear. Its statement as quoted is not very explicit, and it is difficult to read into the instruction the meaning which the Court of Appeals did."

It thus appears that of the two opinions so confidently relied upon by the plaintiff in error, the Banks case evidently misread of misconstrued the opinion in the Earnest case respecting the correctness of the instruction actually given by the Court; while in the Tilghman case the form of instruction requested by the defendant was expressly disapproved.

It is claimed that this statute with respect to the diminishing of the damages undertook to put in force the admiralty rule long applied by the United States courts in actions for negligence against ship owners. We have been unable to

find the purported statement of the Committee of the Judiciary set forth on pages 65 and 66 of the brief, but we are satisfied that the bill was not intended to put in force the admiralty rule with respect to the way in which the proportion of damages should be estimated by the jury. It is the general rule in admiralty cases that where there is contributory negligence the court will apportion the damages, "*provided the libellant's fault, although evident,* is neither willful, gross nor inexcusable, and the other circumstances present a strong case for relief." 36 Cyc. 165. *Max Morris* v. *Curry,* 137 U. S. 1, 34 L. Ed. 586; *The Serapis,* 49 Fed. 393. It is evident that in such cases the court apportions the damages, not according to the "proportion of the negligence," but according to its own ideas of justice and equity. This rule in admiralty cases is entirely different from that prescribed by the Employers' Liability Act, both in the manner as to the method of apportioning the damages and in that, under the admiralty rule, the damages will not be apportioned "unless the libellant's fault, though evident, is neither willful, gross nor inexcusable;" while under the Federal Employers' Liability Act the defendant is liable if it is guilty of any causative negli-

gence, however slight, in connection with that of the plaintiff.

New York, C. & St. Ry. Co. v. *Niebel*, 214 Fed. 952.

Plaintiff in error attempts to force the conclusion that the instruction given by the trial court applied the doctrine of comparative negligence. It is clear that the instruction, in the precise language of the statute, was correct, and that the instruction requested by the defendant, being the only instruction requested by it on this point, would have applied a rule unauthorized by the statute and in direct conflict with the opinion of this Court in the Tilghman case. The only case cited by plaintiff in error at all in point is the Banks case, and we have shown that that opinion was based upon a misconception of the holding of the Earnest case, a fact which was recognized by the Kentucky court.

As bearing upon the question that the instruction given by the trial court was correct, we refer also to the cases of:

Paree v. *Vandalia Ry. Co.*, 169 Ill. App. 12.

Grand Trunk W. R. Co. v. *Lindsay*, 233 U. S. 42, 58 L. Ed. 838.

The contention that the jurors may impeach their verdict is not an open question.

McDonald v. *Pless*, 238 U. S. 264.

No merit appearing in any of the assignments we respectfully suggest that the case should be affirmed.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 743.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ASA P. CARNAHAN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED DECEMBER 6, 1915.

(25,026)

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
v.
ASA P. CARNAHAN.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petition of The Chesapeake and Ohio Railway Company, a corporation chartered under the laws of Virginia, respectfully represents that it is aggrieved by a final judgment of the Circuit Court of the County of Hanover, rendered on March 25th, 1914, in an action of trespass on the case wherein Asa P. Carnahan was plaintiff and your petitioner was defendant, in favor of the said Carnahan against your petitioner, upon the verdict of a jury, for $25,000 damages.

Statement of the Case.

Herewith presented is a transcript of the record in said action from which it appears that Asa P. Carnahan, hereinafter spoken of as the plaintiff, was a fireman in the employment of your petitioner, hereinafter spoken of as the defendant, and that he lost his leg in a collision between a train of the defendant and certain cars belonging to the defendant, situated on its track at Doswell, Virginia, on March 7th, 1913.

The plaintiff was a fireman on train No. 97, Engine No. 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, which left Richmond at 12:40 A. M. March 7th, 1913, West bound.

2 This train, besides the engine and tender, consisted of seven empty tourist sleepers, six of which were being moved "deadhead" (i. e. without passengers or freight) from Richmond, Virginia, to Cincinnati, Ohio. The seventh tourist sleeper on this *car* was to be delivered to the Kanawha & Michigan Railway at Charleston, West Virginia.

It appears that an extra train of defendant known as Extra 596 West, in charge of M. E. Lane and Conductor J. B. Shisler had some time previously moved from Richmond, Virginia, to Doswell, Virginia, with several loaded cars to be delivered to the R. F. & P. R. R. Co. at Doswell, Virginia (a junction point with said railroad) with instructions to pick up certain empty coal cars of the defendant which were at Doswell, Virginia, and bring them to Richmond. At the time of the collision wherein the plaintiff suffered the injuries of which he complains, this latter train had carried and delivered its loaded cars at Doswell, and was collecting the empty cars referred to upon the main track at Doswell, preparatory to forming a train of said empty cars to be hauled back to Richmond to be designated as Extra 596, East.

The train upon which Carnahan was fireman, known as Train No. 97, Engine 199, arrived at Doswell about 2 o'clock A. M. Upon approaching Doswell and before crossing the tracks of the R. F. & P. R. R. Co. at that point it received a signal to stop operated by the telegraph operator in the tower at that point.

Referring to this signal the plaintiff said (Written record, p. 19):

"We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal (the signal to proceed) the engineer used the proper signal to call the flag in (i. e. the flagman protecting his train) and the flagman came in and the proper signal was answered and we proceeded with a clear signal. There was no signal for orders. Under those signals, that is, the signal we got, we are supposed to have the main line movement and the right of tract for 27 miles."

What the plaintiff meant was that the train had been held up some time by a signal which prevented it proceeding and that after being there six or seven minutes this signal was withdrawn and a signal given to proceed which indicated to the trainmen that the road ahead was clear, and that there were no signals given indica-
3 tive that the train was to receive any orders at that station.

The signals given, however, did not relieve Carnahan or any of the train crew of his train from the duties ordinarily incumbent upon them to look-out ahead, give proper signals and the like.

It appears that this train (No. 97, West bound) had originally been halted by the signal referred to on account of the fact that there were certain cars on the main track at Doswell, being collected there, to be brought back to Richmond that night by the train hereinbefore referred to as Extra 596 East. At this time there was a series or "cut" of cars coupled together, standing on the main track, some distance West of Doswell Station, just west of a road crossing there. The R. F. & P. crossing is some distance east of the station; a short distance east of the tower, where the telegraph operator was, and the train upon which the plaintiff was fireman was east of the crossing. These cars were standing on the main track without any lights protecting them. The engin of this train was standing on a side track preparatory to shifting some other cars into this cut of cars standing on the main track and which were to be taken to Richmond. Carnahan saw this engine and knew a train was at the station but states he didn't know any cars were standing on the main line.

He then states:

"Well, after seeing that we had the main line movement, and a clear block—that is, I mean no orders for us, and it indicated to us that we had the block (i. e. clear track) for 27 miles—I had nothing to do but begin firing the engine; in other words, I hooked the fire over and began to put in a little fire at a time—not but two or three shovelsful—in order to keep up the pressure and get away from there; it is upgrade and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that

up to the moment the collision occurred, and had just got in a position to get up on the corner of the seat box to reach for the bell cord. I don't remember whether I ever got hold of the bell cord or not, but that was my intention, to reach far enough to get hold of the bell to give it a pull, and by that time we ran into those cars." (W. R. p. 20).

4 In the collision that followed the plaintiff was caught from his knee of his right leg, down, between the tank on the tender and the boiler head in the cab of his engine and remained pinned in that position for forty-five or fifty minutes, before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for this injury he brought suit.

The explanation of this catastrophe is as follows:

Upon the approach of train No. 97 at Doswell, the operator there, J. W. Beasley, who was in the tower and who controlled the signals and switches as well, being advised of the fact that there were cars standing on the main track gave the signal which halted the west bound train some distance east of the station. Conductor Shisler, who had charge of the making up of the train which was to leave Doswell for Richmond with the empty cars then being switched to form the train was apprised of the arrival of No. 97 at the signal where it was halted shortly after its arrival. The situation of his train there is explained in his evidence (W. R. p. 57), as follows:

"I had fifteen cars on the main line at that time: I think is was about fifteen or sixteen, I would not say just which, now, but about fifteen I think it was, standing on the main line:" that the caboose was on the west end of those cars, but there was nothing attached to the east end, the engine being at that time on a side track there. It further appears that there were no lights of any sort on the east end of the cars, that is facing the direction from which train No. 97 approached, and there were no flagmen placed there to protect the cars.

The operator of the tower was fully aware of the fact that the cars were on the main track. Conductor Shisler and Brakeman T. D. Blue, connected with the train crew of the train being made up at Doswell, then went into the tower, or telegraph office, to confer with the operator as to what arrangements were to be made to let train No. 97, which was waiting there, go by the station. What these arrangements were is the subject of a dispute between Conductor Shisler and Brakeman Blue on the one hand and Operator Beasley on the other. The two latter witnesses testify that Operator Beasley told them he would turn the train standing there (No. 97,

5 west-bound) through a side-track, that is around the cars standing on the main line, and thus allow it to proceed on its route; the operator (Beasley) being able through his levers, &c., to control the switching at that point.

Operator Beasley stated that he understood from the conversation that Conductor Shisler would arrange the switches, &c., to let train No. 97 pass, it appearing that the switches could be as well arranged

by some person on the ground as through the instrumentality of the levers in the tower. The gist of the matter seems to be that there was a misunderstanding as to who was to make the arrangements for train No. 97 to pass the cars standing on the track. The result was that operator Beasley gave train No. 97 a signal to proceed, relying upon Conductor Shisler to arrange for it to pass the cars, and Conductor Shisler and Brakeman Blue, thinking operator Beasley was going to do this took no precautions whatever to keep the train from running into the cars on the track the result being the collision referred to. The speed at which train No. 97 was running was ten or fifteen miles an hour.

After leaving the telegraph office or tower Brakeman Blue seems to have gone over on the side track where some cars were standing which were probably presently to be shifted by the engine of his train, then on the same track. He observed the approach of train No. 97 on the main line which had been given a signal to proceed by Operator Beasley and soon saw that a collision was imminent. He then endeavored by calling out and waiving his lantern, to avert the collision but no one on that train seems to have observed his signals. Had the engineman or the fireman who was injured, Carnahan, observed this warning it appears that they could have probably stopped the train in time to have avoided the accident.

While there was no light of any sort placed as a warning on the cars standing on the track, the engine of train No. 97 was equipped with an oil head light the character of which would have enabled the engineman or fireman to have seen the cars standing on the track in time to have stopped before reaching them.

It was the duty of the plaintiff as the fireman on train No. 97 to look ahead as far as practicable. He endeavored to explain his failure to observe these cars standing on the track by saying that he was shovelling coal and had not ceased very long before the collision occurred. It appeared that he passed a word with the fireman
6 of the engine standing on the side track there (J. L. Hartman) as he passed that engine, but just what he was doing then is not at all clear.

Just before the collision occurred he was reaching for the bell cord to ring for the crossing beyond which the cars were standing on the track. Even then had he observed the cars it is not improbable a collision could have been averted as the train could have been stopped within at least 50 feet, as the signal for the crossing was necessary to be given some distance from the crossing.

The declaration contain four counts. The first two counts charged that plaintiff and defendant were engaged in interstate commerce thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of Operator Beasley and the other upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other two counts were based upon the same grounds of negligence save that they omitted any allegations as to the parties being engaged in interstate commerce thus alleging a cause of action under the State laws.

There was a demurrer to the declaration based upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law. This demurrer the court overruled. It early appeared in the progress of the trial, by a stipulation, that the parties were engaged in interstate commerce at the time the plaintiff was injured (W. R. p. 16) so the court instructed the jury eventually, at the instance of the plaintiff, that they should disregard the third and fourth counts of the declaration, i. e. those based on a cause of action under the State law. (W. R. p. 100, Instruction I).

The case was tried before a regular jury and before the regular panel of nine veniremen had been sworn on their voir dire, and before any members of the panel had been stricken off, as allowed by law, the defendant challenged the array of jurors and moved to quash the venire upon the grounds that (1) the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof and (2) the trial of the case before the jury as summoned, formed, selected and constituted deprived the defendant of rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States
7 passed in pursuance thereof. This motion the court overruled and thereupon the defendant excepted. (W. R. pp. 12-14.)

After all the evidence in the case had been introduced the plaintiff asked for four instructions, numbered respectively I, II, III and IV, all of which the court gave. To the giving of the instructions numbered II and III the defendant excepted. (W. R. pp. 100 and 101). The defendant asked for four instructions marked, respectively, (*a*), (*b*), (*c*) and (*d*). Of these the court gave instructions (*a*) and (*b*) and declined to give instructions (*c*) and (*d*) to which action of the court the defendant excepted.

After the jury had returned their verdict for the plaintiff for $25,000 damages, the defendant moved the court to set aside the verdict of the jury and award it a new trial upon the grounds that (1) it was contrary to the law and evidence; (2) the jury was misdirected by the court, in its instructions (3) the damages were excessive and (4) the jury was not summoned, selected, formed and constituted in accordance with Act VII of the Amendments of the Constitution of the United States and the laws passed in pursuance thereof. This motion the court overruled and the defendant excepted. (W. R. p. 99.)

The defendant then moved in arrest of judgment on the ground that the court should have sustained the demurrer to the declaration for the reason that the defendant having been impleaded in an alleged cause of action arising under the federal law and another under the State law, at the same time, was deprived of rights, privileges and immunities arising from the statutes and Constitution of the United States and was a denial of due process of law. This motion the court overruled, to which action of the court the defendant excepted. (W. R. p. 11.)

Assignments of Error.

Your petitioner avers that in the course of the trial of the said action at law the learned Judge of the Circuit Court of Hanover County erred in the following particulars:

(1) In overruling the demurrer to the declaration and each count thereof;

8 (2) In overruling the challenge to the jury and motion to quash the venire;

(3) In giving instructions II and III asked for by the plaintiff or either of them;

(4) In refusing to give instructions (*c*) and (*d*) asked for by the defendant or either of them;

(5) In overruling the motion to set aside the verdict of the jury and award your petitioner a new trial;

(6) In overruling the motion in arrest of judgment.

I.

The Demurrer to the Declaration.

(*a*) The joinder of causes of action under the State law and the Employers' Liability Act of Congress is not permissible.

The peculiar nature of the Employers' Liability Act of Congress is pointed out in Michigan C. R. Co. v. Vreeland, 227 U. S. 66, 57 L. ed. 419.

It is there said that, prior to the passage of this act, the subject was one which fell within the police power of the statute but, says the court:

"By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms, must supersede all legislation over the same subject by the states."

See also,

Cound v. A. T. & S. F. Ry. Co., 173 Fed. 527, 531;
Mondou v. N. Y. &c. Ry. Co., 223, U. S. 1, 53;
So. Ry. Co. v. Jacobs, 9 Va. App. 28.

The act is the measure and the sole measure of liability of an employer to an employee, engaged in interstate commerce, and cannot be "pieced out" (227 U. S. 66) by a resort to state legislation.

9 The assertion of a right under the state law, therefore, necessarily excludes the idea of a right existing under the act of Congress, and vice versa.

Not only so but the rights given in the two instances are radically different, the principles applicable to a recovery are different, the defenses of the two actions are different and the recoveries in the

two actions are different, and the limitation of the right to sue is different.

This is apparent from a comparison of the act of Congress with the state laws on the same subject.

Can two such actions be joined in one declaration?

"The statement of distinct rights infringed by the same wrong constitutes a statement of distinct causes of action." 23 Cyc. 383.

In the case of Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141; 53 L. J. Q. B. N. S. 476; 51 L. T. N. S. 529; 32 Week Rep. 94, a leading case, the Court held that injury to person and property caused by the same negligent act constitutes two causes of action.

Suits by or against a person in different capacities can never be joined.

Fitzhugh v. Fitzhugh, 11 Gratt. 302.
Epes v. Dudley, 5 Rand. 437.
Kayser v. Disher, 9 Leigh, 357.
Bishop v. Harrison, 2 Leigh, 532.

In McMullin v. Church, 82 Va. 505, it is said:

"But a person cannot, in the same action, join a demand in his own right; and a demand as representative of another or in autre droit; nor demands against a person on his own liability and on his liability in his representative capacity."

The capacity of a plaintiff to sue under the interstate commerce law is entirely different from his capacity to sue at common law. That is his rights are derived from two different and independent sources.

Nor is it permissible to join several different species of action in one declaration, although they may be all ex contractu or all ex delicto, 4 Minor, 447.

The species of action here are entirely different. One is a peculiar, exclusive statutory remedy, enforceable in the state tribunal, it is true, but so enforceable because it is the duty of
10 State courts to enforce federal as well as state laws and, by an act of Congress, special jurisdiction is conferred upon state courts in this class of cases. Mondou case, supra; The other is a common law remedy.

"The general doctrine" says Burks (Pl. & Pr. Sec. 92, 154) "Is that demands may be joined when they are *of the same nature*, and the same judgment is to be given in all, notwithstanding the *pleas may be different.*" (Author's italics.)

The demands in the case before us while they are in one sense of the same nature, in another sense they are entirely distinct and utterly disconnected. One demand is that arising out of an act of Congress creating a right and a liability where none existed before; the other is a demand arising out of a common law tort, reinforced by the state statute.

The same judgment cannot be given in both cases for the reason that a judgment on one count excludes the possibility of a judgment on the other—the causes of action being utterly inconsistent the one with the other.

A general verdict of the jury could not be permissible and could not be possible, inasmuch as there could not be a verdict on both counts, and the situation would be anomalous.

In 23 Cyc. p. 396, it is said that "a plaintiff cannot recover upon two or more inconsistent counts in his declaration."

And in 31 Cyc. p. 75, it is said "But if allegations are so utterly repugnant as to destroy one another, so that no cause of action or defense remains a general demurrer will lie against the pleading"; and further on: "The test of inconsistency is whether proof of one averment tends to disprove the other."

It is true that "the fact that inconsistent allegations as to the cause of the accident are made, it has been held, will not render a complaint for negligence defective" (31 Cyc. 76), but that is obviously an entirely different proposition—because the object of stating the case in different counts of a declaration is to meet the different phases of the proof. And this is as far as the Virginia Courts have gone.

See Seal v. V. P. Cement Co., 108 Va. 806.

In such a case whatever the facts may be ultimately de-
11 cided to be, the judgment of the court is the same and is to be measured by the same standard and the same legal principles are brought into play—which is decidedly not true in the case under consideration.

Upon a demurrer to a declaration for misjoinder the objection, if well founded, goes to the whole declaration.

Henderson v. Stringer, 6 Gratt., 130.

Malsby v. Lanark Co., 55 W. Va., 486; 47 S. E. 358; citing 4 Minor's Insts. p. 1161.

"When there is a misjoinder of counts a demurrer for this cause will be a general demurrer to the whole declaration not to a particular count, or a particular breach or to any other part of a count. This principle is in no wise inconsistent with that which requires a demurrer to a particular count, or a particular part of a count in order to make available an objection applicable to any one count or part of a count *then* to any other. The objection is that the plaintiff has joined causes of action which the law does not allow to be joined; and the objection, if sustained, necessarily shows that the whole declaration is bad."

1 Rob. (Old) Prac., 284. (Cited in Malsby v. Lanark Co., supra.)

See 4 Minor's Inst., 448.

Gary v. Abingdon Pub. Co., 94 Va. 779.

(*b*) The joinder of these causes of action is not permissible on another ground, which is more specifically set out in the motion in arrest of judgment, and that is that the uniting of the cause of action under the State law with a cause of action under the federal law is a denial of the due process of law guaranteed by the 5th Amendment to the Constitution of the United States.

It will be presently shown that cases under the federal employers' liability act presents federal questions and that the provisions of the 5th and 7th amendments to the Constitution apply to such cases even when proceeded in, in a State court. Assuming, at this time, that such is the case, the question presented is whether it is due process of law under federal jurisprudence, for a litigant to be hampered in the assertion of a federal right by being at the
12 same time impleaded under the state law and thus be required to defend two cases at the same time or else placed in such a position that in avoiding one he will fall into the other. It will be observed that the question, as we are now presenting it, is not complicated with any inquiry as to whether the 5th or 14th amendment applies here, it being now assumed that the 5th amendment applies to this particular proceeding; relying upon the discussion that is to follow in regard to the applicability of the 7th Amendment as a demonstration of that proposition; the two amendments being in pari materia on this question. It would seem, however, that there is no real distinction between the 5th and 14th amendments as to the meaning of "due process"—though the Supreme Court of the United States has declined to commit itself on that question. Slaughter-House Cases, 16 Wall. 36.

Due process of law in the fifth amendment refers to "that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law." In Re. Kemmler, 136 U. S. 448.

There must be a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Pennoyer v. Neff, 95 U. S. 714.

This idea is well presented in the case of Williams Admr. v. Newman, 93 Va. 725: President Keith, speaking for the Court in that case said:

"To constitute due process of law it is necessary that the court should have jurisdiction, and that some recognized and accustomed mode of proceedure should be pursued, and these, as we have seen, are presented in this case.

The cause was before the proper court and is presented in a creditor's bill. But these requisites standing alone are not sufficient. The complaint must be presented by the proper party and against the proper party. *The plaintiff must set out his cause of action so that the defendant may avail himself of all just defences permitted him by the law of the land.*" (Italics ours.)

It will be observed that the contention is stronger as to the procedure in this case being a lack of due process, under the fifth amendment, than would be the case if this were a state pro-
13 ceeding in a state court, as to which the fourteenth amendment would apply, for the reason that while the federal courts, under the conformity act of Congress, adopt the practice of State courts, as far as they can, to federal proceedure, a defendant cannot

be proceeded against in the federal courts for violation of state laws along with federal laws at the same time. Thus if this proceedure is permissible in a state court there is a denial of the equal protection of the laws which is one of the essentials of "due process."

It is believed that the opportunity of an intelligent defence is denied where a defendant is proceeded against in the same action for alleged violations of the laws of two different sovereignties and that so far from it being in accordance with the settled rules of common law proceedure it is an unheard of thing under that system of jurisprudence.

II.

The Challenge to the Array of Jurors and Motion to Quash the Venire.

As before stated the jury in this case was a regular jury, summoned under the State law, and consisted of nine veniremen which, after the plaintiff and defendant had each stricken off one veniremen, left a jury of seven men who tried the case. The motion referred to was made before the jury had been examined on their voir dire and before any members of the panel had been stricken off by either party.

The grounds of this motion were set out at the time the motion was made, the point being that the jury was not summoned, selected, formed and constituted as required by the Constitution of the United States.

Article VII of the Amendments to the Constitution of the United States provides:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The jury referred to in this amendment is the common law jury of twelve men. Capital Traction Co. v. Hof, 170 U. S. 343; Maxwell v. Dow, 176 U. S. 581.

14 And the phrase "suits at common law," found in this Article, means "not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those in which equitable rights alone were recognized and equitable remedies were administered; or which, as in admiralty a mixture of public law and of maritime law and equity was often found in the same suit."

Parsons v. Bedford, 3 Peters, 433, 434.

The question early arose as to whether the fifth and seventh amendments to the federal constitution among others, applied to proceedings in state courts where state and not federal rights were involved and it was held that they did not.

Referring to the fifth amendment Chief Justice Marshall said, in Barron v. Balto. 7 Peters, 251:

"We are of opinion that the provision in the fifth amendment to the Constitution declaring that private property shall not be taken without just compensation is intended solely as a limitation on the exercise of power by the government of the United States and is not applicable to legislation by the states."

See also Walker v. Savinet, 92 U. S. 90.

After the adoption of the fourteenth amendment to the Constitution it was contended that this amendment extended the protection of the fifth and seventh amendments to state proceedings where state rights alone were concerned.

This contention was denied in the Slaughter House cases, 16 Wall. 36, 74, 78.

See also Brown v. New Jersey, 175 U. S. 172.

Maxwell v. Dow, 176 U. S. 581.

It will be observed that the question decided in these cases is that the seventh amendment does not apply to proceedings in State courts where state rights are alone involved.

The question presented in this case is whether the provisions of the seventh amendment to the federal constitution, in relation
15 to trial by jury, extend to proceedings in state courts where federal rights are involved.

This question is of unusual interest and far-reaching importance. It appears never to have been passed upon by the Supreme Court of the United States, though that court has decided an analagous question in favor of the federal right as will be presently shown.

It appears to be one of the few missing links in the chain of constitutional construction forged about that instrument by the master minds of Marshall and Story and the other great expounders of the Constitution.

The contention we now make is, first the seventh amendment operates on the federal right and not alone on the federal tribunal and, second, the state court, quoad this action, is a quasi federal tribunal.

(*a*) That the seventh amendment operates on the federal right rather than the federal tribunal is we think obvious from the history of the amendment.

Said Mr. Justice Story in Parsons v. Bedford, 3 Peters, 446:

"One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

The lack of this provision in the original federal constitution was ably defended by Hamilton and others in the Federalist but their

defense, though plausible, was unsatisfactory to the people at large. (See the Federalist, No. 81 and No. 83; Story's Const. Sec. 1768, et seq.)

It is to be observed that at the time of the adoption of the Constitution there were no inferior federal tribunals. The sole federal court created by that instrument was the Supreme Court of the United States invested with original jurisdiction in only a limited class of cases and with appellate jurisdiction in all other cases involving federal rights and raising federal questions. The establishment of other federal tribunals was left wholly with Congress. It seems clear therefore that if the amendment was to operate at all it must operate in whatever tribunals the federal questions might arise.

It will be observed that the seventh amendment has two branches, one securing the right of trial by jury and the other providing that no fact tried by jury shall be re-examined in any court of the United States otherwise than according to the rules of the common law. The object of both the provisions, is the same that is to preserve the right of trial by jury, i. e. to secure the right to the litigant in the first instance and to prevent the appellate courts from interfering with that right in an appellate proceeding.

Parsons v. Bedford, 3 Peters, 446, 449.
Slocum v. N. Y. Life Ins. Co., 228 U. S. 879.

In the case of C. B. & Q. R. R. Co. v. Chicago, 166 U. S., 242, the court had occasion to consider whether the last clause of the seventh amendment applied to an appeal from a state court to a federal court and the court held that it did, and observed:

"It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest cou-t, of the state. One objection made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law. The seventh amendment was intended to meet these objections and to deprive the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union and leave it open for those courts to re-examine, in disregard of the rules of the common law, facts tried by juries empanelled in the State courts in cases which, by reason of the questions involved of them, could be brought under the cognizance of the courts of the United States."

The Justices v. Murray, 9 Wall. 274.
Capital Traction Co. v. Hoff, 174 U. S. 1.
Cooley's Principles of Const. Law, p. 266.

Why should the federal appellate court be at pains to preserve the right of trial by jury in the original court if that right may be denied the litigant when he gets there?

(*b*) That the seventh amendment is a limitation upon the power of Congress to authorize any court to try a common law suit involving more than twenty dollars, without a jury, or with a jury of less than twelve men, will not and cannot be denied.

The jurisdiction of the State courts in suits under the Employers' Liability Act of Congress is under certain acts of Congress. See Judicial Code, sec. 28: Employers' Liability Act, Amendment of 1910.

Furthermore when they are brought in the State court the defendant is denied the right of removal to the federal court.

Mr. Hamilton in the Federalist (No. 81) was of opinion that for Congress to invest state courts with jurisdiction of federal questions peculiar to the Constitution would be to constitute them federal tribunals for that purpose.

That there were certain causes, jurisdiction of which without any act of Congress, could be exercised concurrently by the state and federal courts is benerally admitted. Cohens v. Virginia, 6 Wheat. 397; Story's Const. Sec. 1754; The Federalist No. 82.

But as to cases peculiar to the Constitution, such as those arising under the laws of the United States (the case before us) there seems to have been considerable doubt whether the state courts, without Congressional action, had any such jurisdiction. Story's Const. Sec. 1754 and cases cited in note 5. Indeed Mr. Justice Story was of opinion that Congress could not confer jurisdiction in that class of cases upon the State Courts. Martin v. Hunter, 1 Wheat. R. 330. In this however he was not followed. The Justices v. Murray, 9 Wall. 274; Mondou case, 223 U. S. 1, 58.

The whole question came before the Supreme Court of the United States in the case of Claflin v. Houseman, 93 U. S. 130, and it was there held that "rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States Courts, or in State Courts, competent to decide rights of like character and class; subject, however, to this qualification, that
18 where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Court exclusive jurisdiction." See also the Mondou case, supra.

It is perhaps true, under these latter decisions, that independently of any action by Congress the State Courts would have jurisdiction over this class of cases. But Congress has acted and acted in so vigorous a fashion, that when these suits are brought in the State Courts, the defendant is deprived of a right of removal to the federal courts. Judicial Code, Sec. 28; Lee v. Toledo, &c., R. Co. 193 Fed. 685.

The State courts then, in these cases, when they are originally prosecuted in those forums are courts invested by Congress with original jurisdiction of suits arising under the laws of the United States, and therefore for this purpose they are quasi federal courts—

courts exercising, by virtue of congressional enactments, authority over rights and remedies created by federal law.

And having been invested with such authority by Congress there necessarily attaches all the limitations upon this authority imposed by the federal constitution, including of course the provisions of the seventh amendment.

As before stated this question does not seem to have been directly passed upon by the Supreme Court of the United States.

The question was raised in the case of M. K. & T. R. Co., v. West, Advance Opinions U. S. Sup. Ct., May 1, 1914, a case coming from a State court, as to whether a verdict of three-fourths of the jury, permissible under the State law, was sufficient in a suit brought under the Employers' Liability Act. The court held, however, that the act did not apply, but observed "as the action was brought under the state law, and not under the federal law, it becomes unnecessary to notice errors assigned by the railway Company, including that based on the instruction of the trial court that a verdict could be rendered by three-fourths of the jury."

III.

The Instructions.

Instruction III given for the plaintiff is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the
19 plaintiff in this action, then, in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future not however in excess of $35,000.00 as to them may seem just and fair."

This instruction is erroneous in two particulars: First, it allowed the jury, in estimating the damages to the plaintiff, to take into consideration "its effect upon his future."

This language was entirely too broad and allowed the jury to take into consideration things which might be in their nature essentially speculative and remote and for which there could be no recovery in damages.

There are many "effects upon his future," resulting from the injury, which the jury should not have been allowed to consider.

It is not at all the damages or "effects" flowing from an injury for which a defendant can be held liable, but only such damages as are the "legitimate sequence of the thing amiss" and such as could have been foreseen in the light of the circumstances existing at the time.

Allison v. Fredericksburg, 112 Va., 243.
Fowkes v. So. Ry. Co., 96 Va. 742.

The instruction allowed the jury to go far beyond that.

Under it the jury might have considered the possibility of the

plaintiff's promotion and speculative profits from collateral undertakings upon which he might have embarked but for the injury both of which have been condemned as improper elements of damage in such cases.

R. & D. R. Co. v. Elliott, 149 U. S. 267.
Boston, &c. Co. v. O'Reilly, 158 U. S. 334.

All of these things are "effects upon the future."

Again the jury under that instruction, might have taken into consideration possible future physical effects from the injury such as future suffering which, in the absence of any evidence as to the probability of such future suffering, was improper.

Norfolk &c. R. Co. v. Spratley, 103 Va. 388.
Block v. Milwaukee, &c. R. Co., 89 Wis. 371, 27 L. R. A., —.
Shultz v. Griffin, 103 Iowa, 150, 40 L. R. A., 117.
1 Joyce on Damages, Sec. 246.

Second. The instruction directs the attention of the jury to the sum of $35,000 the amount claimed, without qualifying it with the statement that the sum was mentioned merely because it was the maximum amount claimed in the declaration.

It sees that if the jury may have been misled by such a statement in an instruction, it is reversible error.

Newport News P. Co. v. Beaumeister, 104 Va. 748.

Instructions (*c*) and (*d*) asked for by the defendant and refused, told the jury that in estimating damages to the plaintiff they could not take into consideration the chance of his increased earnings by reason of promotion or the prospects of any increased earnings to be made by him. We have shown that these elements of damage were improper. It is true the Court, during the argument, orally instructed the jury to disregard these elements of damage; but the court erred in not giving them the written instructions asked for by the defendant so that the jury might have taken the instructions to their room, along with the instructions for the plaintiff, one of which was broad enough to permit the jury to consider those very elements of damage.

IV.

The Motion for a New Trial.

The only one of the grounds of this motion which has not already been considered is the ground of excessive damages. Of course, it is difficult, if not impossible, for the courts to fix any limit to which the juries should be allowed to go in any particular case or class of cases and yet there must be some control of this matter taken by the courts, or else by successive gradations in the size of the verdicts of juries in these cases there will be gradually brought about a practical confiscation of property of railroad companies.

Of course, the injuries in this case were very severe and the

circumstances connected with the accident were distressing,
21 but, by comparison at least, the amount allowed the jury was grossly excessive. In a very recent case in this court (Belmont v. McAllister, 9 Va. App. —) the court took control of this subject and reduced the amount allowed an attorney for services performed by him, on the ground that it was grossly excessive.

Much was said and will be said as to the pain suffered by the plaintiff and that there are no human scales by which it can be measured, all of which is true. But that merely emphasizes the necessity of not allowing the jury free sway, as under that theory, no amount whatever would be excessive.

The question arising on the motion in arrest of judgment has already been considered.

Your petitioner therefore prays for a writ of error and supersedeas to the judgment complained of and that the same may be reviewed and reversed.

Respectfully submitted,

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By Counsel, D. H. & WALTER LEAKE, *f. p.*

The undersigned, counsel practicing in the Supreme Court of Appeals of Virginia is respectfully of opinion that there is error in the accompanying record and that the judgment complained of should be reviewed and reversed.

May 26th, 1914.

D. H. LEAKE.

Received May 28, '14.

JAMES KEITH.

Writ of error and supersedeas awarded. Bond $30,000.00.

JAMES KEITH.

Rec'd May 29/14.

H. S. J.

22 VIRGINIA:

Pleas Before the Circuit Court of Hanover on the 25th Day of March, 1914.

Be it remembered that heretofore, to-wit: At rules held in the Clerk's Office of the said Circuit Court, on Monday the 5th day of January, 1914, came A. P. Carnahan, by his attorneys and filed his declaration against the Chesapeake & Ohio Railway Company, of a plea of Trespass on the Case, which declaration is in the words and figures following, to-wit:

Declaration.

First January Rules, 1914.

A. P. Carnahan complains of the Chesapeake & Ohio Railway Company, a corporation, of a plea of trespass on the case for this, to-wit:

First Count. That heretofore, to-wit, at the time of the commission of the grievances hereinafter complained of, the said defendant was a common carrier by railroad and owned and operated a certain line of railway, with tracks, side tracks, and switches, running from Cincinnati, Ohio, through the state of Ohio, and from Louisville, Ky., through the state of Kentucky, and through the state of West Virginia and through the state of Virginia to Newport News, and through the County of Hanover, in Virginia, and the said defendant was then and there as such common carrier by railroad engaged in commerce between the states aforesaid; and the said defendant in and about its said business used on said railway steam locomotives and cars for the transportation and hauling of freight and passengers.

And the said plaintiff says that before and at the time of the commission of the grievances hereinafter set out, to-wit: on the 7th day of March, 1913, he was in the employment of the said defendant as a fireman upon a certain engine then and there hauling a certain train of the said defendant known as No. 97; which the said defendant was then and there using in its said business in the transportation of certain cars used and then and there being used by it in such commerce, from the state of Virginia to the state of West Virginia, and the other states aforesaid. That the said train was then in the County of Hanover, and its destination was westward over said railway, as aforesaid. The said plaintiff says that while the said defendant was then and there as such common carrier by railroad engaged in such commerce between the states aforesaid, the said plaintiff was employed by the defendant in such commerce.

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And the said plaintiff says that the said defendant then and there as such carrier had in its services engaged about the work aforesaid, certain other servants, agents, and employees, to-wit: conductors, engineers, firemen, switchmen, flagmen, brakemen, and persons in charge of switches and signal points, and in said County of Hanover, at Doswell, had located a certain signal tower or signal point from which signals to govern movement of trains over the defendant's said railway were given, and switches in that vicinity adjusted, which signal tower and signals and switches were in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark *and* the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal

tower, stopped. Thereupon, it became and was the duty of the said defendant and of the employee and agent of said defendant in charge of said signal tower not to permit the said train on which the said plaintiff was employed, as aforesaid, to proceed upon its journey westward while it had notice that the tract ahead was obstructed.

And the said plaintiff says that on the day and year aforesaid, at the time aforesaid, there were on the main tract of said railway, a short distance West of said signal point, certain other cars under the control of the said defendant, of which fact the said defendant and the said employee and agent of said defendant in charge of said signal tower, or signal point, had notice. But the presence of said cars on said tract was unknown to said plaintiff or to any employee on said train on which the plaintiff was working, and the plaintiff and said last names employees had no notice of the presence of said cars on said track.

Yet, the said defendant did not regard its duty in this behalf, but on the contrary, so carelessly and negligently conducted itself through its said employee and agent in charge of said signal tower, or signal point, that the said signal was then and there given requiring the said train on which the plaintiff was working, to proceed Westward and the switches adjusted so that it should proceed on said main track without warning or notice that said track was blocked and obstructed by said cars; but, on the contrary, by said signal notified the said plaintiff that said track was cleared and free of obstruction and caused said train to proceed Westward, and thereupon and by reason of the said negligent acts of the said defendant, said locomotive on which the plaintiff was riding, engaged in his work on said engine as his duty required, was driven upon and against the said cars on said tract, on which the said train was then and there proceeding, and by said collision one of the said plaintiff's legs was so mangled and burned that it had to be amptuated, and the plaintiff was otherwise greatly injured.

Second Count. And for this also, to-wit: That heretofore, to-wit, at the time of the commission of the grievances hereinafter complained of, the said defendant was a common carrier by railroad and owned and operated a certain line of railway, with tracks, side tracks, and switches, running from Cincinnati, Ohio, through the state of Ohio, and from Louisville, Ky., through the state of Kentucky, and through the state of West Virginia, and through the state of Virginia to Newport News, and through the County of Hanover in Virginia, and the said defendant was then and there as such common carrier by railway engaged in commerce between the states aforesaid; and the said defendant in *the* about its said business used on its said railway steam locomotives and cars for the transportation and hauling of freight and passengers.

And the said plaintiff*s* says that before and at the time of the commission of the grievances hereinafter set out to-wit, on the 7th day of March, 1913, he was in the employment of the said defendant as fireman upon a certain engine then and there hauling a certain train of the said defendant, known as "No. 97," which the said defendant was then and there using in its said

business, in the transportation of certain cars used and then and there being used by it in such commerce, from the state of Virginia to the state of West Virginia, and the other states aforesaid. That the said train was then in the county of Hanover, and its destination was Westward over said railway, as aforesaid. The said plaintiff says that while the said defendant was then and there as such common carrier by railroad engaged in such commerce between the states aforesaid, the said plaintiff was employed by said defendant in such commerce.

And the said plaintiff says that the said defendant then and there as such carrier had in its service engaged about the work aforesaid, certain other servants, agents, and employees, to-wit, conductors, engineers, firemen, switchmen, flagmen, brakemen, and persons in charge of switches and signal points, and in said county of Hanover, at Doswell, had located a certain signal tower or signal point from which signals to govern movement of trains over the defendant's said railway were given, which signal tower was in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that heretofore, to-wit, on the 17th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark, the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal tower, stopped. The said plaintiff says that on the day and year aforesaid, and at the time aforesaid, there was on said main track, a short distance Westward from Doswell, certain other cars under the control of said defendant, part of another train of the said defendant, of the presence of which last named cars on said track, the said plaintiff and the employees in charge of the train on which the said plaintiff was working, neither knew or had notice; of the presence of which cars so obstructing said track the said employee and agent of said defendant in charge of said signal tower had notice.

Thereupon, it became and was the duty of the said defendant to use reasonable care to warn the employees in charge of said train on which said plaintiff was working, of obstructions on said track, and it was then and there the duty of the employees of said defendant who had charge of said other cars obstructing said track as
26 aforesaid not to permit said cars to remain on said main track without light thereon and warnings to other trains that might be proceeding on said main track, and especially to the train on which the plaintiff was working, as aforesaid.

Nevertheless, the said defendant and the said employees on said train then and there permitted said cars to remain on said track without warning or signal or other notice to the plaintiff, or to the employees in charge of the train on which the plaintiff was working; that said track was so obstructed, and the said train on which the plaintiff was working, was then and there directed to proceed along said main track to the Westward, and thereupon, by reason of the negligent acts of the said defendant and the said employees on said other train, the said plaintiff and the employees in charge of the train on which he was

working, as aforesad, being ignorant that said tract was so obstructed, collided with said cars so obstructing the track, as aforesaid, and said locomotive on which the plaintiff was riding, engaged in his work thereon, as his duty required, was driven upon and against said train of said track, and by said collision, one of said plaintiff's legs was so mangled and burned that it had to be amputated and the plaintiff was otherwise greatly injured.

Third Count. And for this also, to-wit: That heretofore, to-wit, on the 7th day of March, 1913, the said defendant was a railroad company and owned and operated a certain line of railroad with tracks, side tracks, and switches running through the state of Virginia, from Richmond, Va., to Charlottesville, Va., and through the County of Hanover, and the defendant used thereon steam locomotives and cars for the transportation and hauling of freight and passengers, and the defendant then and there, in and about the operation of its business aforesaid, employed certain conductors, flagmen, brakemen, switchmen, and persons who had charge of switches and persons who had charge of signal points, and persons who had charge of locomotive engines.

And the said plaintiff says that heretofore, to-wit, before and at the time of the commission of the grievances hereinafter set out, being heretofore, to-wit, the day and year above mentioned, he was in the employment of the said defendant as a fireman upon a certain locomotive attached to a certain train of the said defendant,
27 known as "No. 97," which was then and there proceeding from Richmond, Va., to Charlottesville, Va., and was then and there in Hanover County, in Virginia, at Doswell. And the said plaintiff says that at Doswell said defendant had located a certain signal tower and signal point from which signals to govern movement of trains over the defendant's said railway were given, and switches in that vicinity adjusted, which signal tower and signals and switches were in charge of a certain employee of the said defendant.

And the said plaintiff says that on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M., and while the night was very dark and the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to a signal from said signal — duty of the said defendant and of the employee and agent of said defendant in charge of said signal tower not to permit the said train on which the said plaintiff was employed, as aforesaid, to proceed upon its journey westward while it had notice that the track ahead was obstructed.

And the said plaintiff says that on the day and year aforesaid, at the time aforesaid, there were on the main tract of said railway, a short distance West of said signal point, certain other cars under the control of the said defendant, of which fact the said defendant and the said employee of said defendant in charge of said signal tower, or signal point had notice. But the presence of said cars on said track was unknown to said plaintiff or to any employee on said train, on which the plaintiff was working, and the plaintiff and said

last named employees had no notice of the presence of said cars on said track.

Yet, the said defendant did not regard its duty in this behalf but, on the contrary, so carelessly and negligently conducted itself through its said employee and agent in charge of said signal tower, that the signal was then and there given requiring the said train on which the plaintiff was working, to proceed westward, and the switches adjusted so that it should proceed on said main tract without warning or notice that said track was blocked and obstructed by said cars; but, on the contrary, by said signal notified the said plaintiff that said track was cleared and free of obstructions, and caused said train to proceed Westward, and thereupon and by reason of the said negligent acts of the said defendant, said locomotive on which said plaintiff was riding, engaged in his work on
28 said engine, as his duty required, was driven up and against said cars on said track, on which the said train was then and there proceeding, and by said collision one of the plaintiff's legs was so mangled and burned that it had to be amputated, and the plaintiff was otherwise greatly injured.

Fourth Count. And for this also, to-wit: That heretofore, to-wit, on the 7th day of March, 1913, the said defendant was a railroad company and owned and operated a certain line of railroad with tracks, side tracks and switches running through the state of Virginia, from Richmond, Va. to Charlottesville, Va., and through the County of Hanover, and the defendant used thereon steam locomotives and cars for the transportation and hauling of freight and passengers, and the defendant then and there, in and about the operation of its business, aforesaid, employed certain conductors, flagmen, brakemen, switchmen, and persons who had charge of switches and persons who had charge of signal points, and persons who had charge of locomotive engines.

And the said plaintiff says that heretofore, to-wit: before and at the time of the commission of the grievances hereinafter set out, being heretofore, to-wit, the day and year above mentioned, he was in the employment of the said defendant as a fireman upon a certain locomotive attached to a certain train of the said defendant, known as "No. 97," which was then and there proceeding from Richmond, Va., to Charlottesville, Va., and was then and there in Hanover County, in Virginia, at Doswell. And the said plaintiff says that at Doswell said defendant had located a certain signal tower and signal point from which signals to govern movement of trains over the defendant's said railway were given, which signal tower was in charge of a certain employee and agent of the said defendant.

And the said plaintiff says that heretofore, to-wit, on the 7th day of March, 1913, aforesaid, in the night time, to-wit, at about two o'clock A. M. and while the night was very dark, the train of the said defendant on which the plaintiff was employed, as aforesaid, approached said signal tower at Doswell, and, in response to the signal from said signal tower, stopped. The said plaintiff says that on the day and year aforesaid, and at the time aforesaid, there

were on said main track, a short distance Westward from
29 Doswell, certain other cars under the control of said defendant, part of another train of the said defendant, of the presence of which last named cars on said track, the said plaintiff and the employees in charge of the train on which the said plaintiff was working, neither knew or had notice; of the presence of which cars so obstructing said track the said employee and agent of said defendant in charge of said signal tower had notice.

Thereupon, it became and was the duty of the said defendant to use reasonable care to warn the employees in charge of said train on which said plaintiff was working, of obstructions, on said track, and it was then and there the duty of the said employees of said defendant who had charge of said other cars obstructing said track, as aforesaid, not to permit said cars to remain on said main track without light thereon and warning to other trains that might be proceeding on said track, and especially to the train on which the plaintiff was working, as aforesaid.

Nevertheless, the said defendant and the said employees on said train then and there permitted said cars to remain on said track without warning or signal or other notice to the plaintiff, or to the employees in charge of the train on which the plaintiff was working that said track was so obstructed, and the said train on which the plaintiff was working was then and there directed to proceed along said main track to the Westward, and thereupon, by reason of the negligent acts of the said defendant, and the said employees on said other train, the said plaintiff and the employees in charge of the train on which he was working, as aforesaid, being ignorant that said track was so obstructed, collided with said cars so obstructing the track, as aforesaid, and said locomotive on which the plaintiff was riding, engaged in his work thereon, as his duty required, was driven upon and against said train on said track, and by said collision, one of said plaintiff's legs was so mangled and burned that it had to be amputated and the plaintiff was greatly injured.

To the damage of the said plaintiff of Thirty-five Thousand ($35,000.00) Dollars. And therefore he institutes this action of trespass on the case.

ALLEN & WALSH, *P. Q.*

Whereupon the defendant being summoned and not appearing,
30 on motion of the plaintiff by his attorneys, it was ordered that judgment be entered for the plaintiff against the defendant for what damages the plaintiff had sustained unless the defendant should appear and plead to issue at the then next rules.

At which day, to-wit: At rules held in the Clerk's Office of the said Circuit Court of Hanover County, on Monday the 12th day of January, 1914.

The defendant still failing to appear, on motion of the plaintiff by his attorneys, it was ordered that the last order made against it in this cause be confirmed and that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to-wit: At a Circuit Court for Hanover County, held at the Court House in said County on the 24th day of March, 1914.

This day came the parties by their attorneys and the defendant filed a demurrer to the declaration which being argued by counsel the court overruled, to which the defendant excepted, and the defendant entered the plea of "not guilty," and puts itself upon the Country and the plaintiff doth the like. Thereupon came the jury drawn, summoned and in attendance upon the Court in the manner prescribed by law and the defendant challenged the array of jurors and moved to quash the venire upon grounds set out in a writing filed in the record which is in the words and figures following, to-wit: 1. The Jury in this case is not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof. 2. The trial of this case before the Jury as summoned, formed, selected and constituted deprives the defendant of the rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States passed in pursuance thereof. (Marked A.) Which motion being overruled by the Court the defendant excepted thereto, and the Jury, to-wit: H. J. Cross, T. E. Stanley, Henry Heath, W. M. Wingfield, R. A. Harris, J. S. Priddy, and B. C. Blunt, being elected, tried and sworn the truth of and upon the premises to speak, and having fully heard the evidence and the usual hour of adjournment having arrived were adjourned over until tomorrow morning at 10 o'clock.

And on another day, to-wit: Wednesday, March 25th, 1914.

This day came again the parties and the jury adjourned
31 over on yesterday appeared into Court pursuant of their adjournment and having been instructed in writing by the Court and fully heard the argument by Counsel, retired to their room and after some time returned into Court and returned the following verdict, to-wit: "We, the Jury find for the plaintiff and fix the damages at $25,000.00 (signed) J. S. Priddy, foreman;" and the Jury being discharged the defendant moved the Court to set aside the verdict as contrary to the law and evidence and grant a new trial for the following reasons, to-wit: First. Contrary to law and evidence. Second. Misdirection of the Court to the Jury. Third. The damages are excessive. Fourth. The Jury was not summoned, selected, formed and constituted in accordance with Article VII, of the amendments of the Constitution of the United States and the laws passed in pursuance thereof. Which motion the Court overruled to which ruling of the Court the defendant excepted. Thereupon the defendant moved in *the* arrest of judgment for the following reasons, to-wit: "The defendant moved in arrest of judgment in that the demurrer to the declaration should have been sustained on the ground that:—*That* it is a right, provilege and immunity of the defendant, a corporation engaged in interstate commerce arising under the Constitution and Statutes of the United States, when impleaded by a plaintiff alleging himself to be engaged in interstate commerce at the time of his injury and suing to recover

damages for such alleged injury under the act of Congress of April 22nd, 1908, as amended to have said action heard and determined without being hampered and restricted by being at the same time jointly sued by means of other counts in the same declaration for alleged causes of action arising under the laws of the State of Virginia; That said alleged causes of action are inconsistent and repugnant and the trial of the same necessarily resulted in confusion and uncertainty and the defendant was thereby deprived of his rights, privileges, and immunities, arising from the statutes and constitution of the United States aforesaid and was denied due process of law." Which motion is overruled, to which the defendant excepted.

Thereupon it is the judgment of the Court that the plaintiff A. P. Carnahan, recover of the defendant The Chesapeake & Ohio Railway Company the sum of Twenty-five Thousand Dollars the amount by the Jury in their verdict ascertained and his cost by him
32 about his suit in this behalf expended.

And the defendant having indicated its intention to apply for a Writ of Error and supersedeas in this case execution is suspended for sixty days.

MEMO.—During the progress of the trial the defendant excepted to sundry rulings and decisions of the Court and by consent of parties in open court and now entered of record the defendant is given sixty days within which to prepare and present to the Court its several bills of exception which when received will be signed, sealed and made a part of the record.

Bill of Exceptions No. 1.

Be it remembered that on the trial of this cause and after the jury, which was a regular jury summoned for the term of Court during which this case was tried, under a venire facias, which it was admitted by the defendant, was issued and returned in conformity with the statutes of Virginia and which is in the following words and figures, to-wit:

The Commonwealth of Virginia to the Sheriff of Hanover, Greeting:

We command you, that you summon and cause to come before the Circuit Court for the County of Hanover, on the 18th day of March, 1914 (that being the third day of March term of said Court), nine persons:

1. Nelson Hughes,
2. H. J. Cross,
3. T. E. Stanley,
4. Henry Heath,
5. W. M. Wingfield,
6. O. B. Green,
7. R. A. Harris,
8. J. S. Priddy,
9. B. C. Blunt.

they being drawn jurors for the said Court for the said County to serve as jurors during the term aforesaid. And have then there this writ and the names of the jurors.

Witness, C. W. Taylor, Clerk of our said Court, at the
33 court-house the 3rd day of March, 1914, and in the 138 year of the Commonwealth.

C. W. TAYLOR, *Clerk*

Drawn in our presence, this 2d day of March, 1914.

GEO. P. HAW,
Commonwealth's Attorney.
J. C. STEVENS,
Commissioner in Chancery.

And before the jury had been examined on their voir dire and before they had been sworn to try the issue joined and before the plaintiff and defendant had exercised their respective rights under the Statute of Virginia of each striking off one member of the jury from the panel, the defendant by counsel, submitted in writing the following motion to the Court, upon the grounds stated therein, as follows:

Challenge to the Jury and Motion to Quash the Venire.

And now comes the said defendant and challenges the array of jurors, in this case and moves the court to quash the venire on the following grounds:

1. The jury in this case is not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof.

2. The trial of this case before the jury as summoned, formed, selected and constituted, deprived the defendant of the rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of United States, passed in pursuance thereof.

The Court thereupon overruled said challenge and motion, to which ruling of the Court the defendant, by counsel, excepted, and tenders this its bill of exceptions No. 1 and prays that it may be signed, sealed, and made a part of the record in this cause
34 and the same is done accordingly on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

Bill of Exceptions No. 2.

Be it remembered that, on the trial of this cause, and after the jury had been selected and sworn to try the issue joined, the plaintiff and the defendant, respectively, introduced to the jury the following evidence:

NOTE.—Before the opening statements were made all witnesses were excluded from the court room, upon motion of counsel for the defendant.

After the opening statements by Mr. Allen, on behalf of the plaintiff and by Mr. Carter on behalf of the defendant, the plaintiff, to sustain the issue on his part, introduced the following evidence:

Stipulation.

It is agreed by the Chesapeake & Ohio Railway Company that the following statement taken from the records, shall be used as evidence in the same manner as if the defendant had been required to produce it under Section 3371 of the Code of Virginia:

Train No. 97, Engine 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, left Richmond at 12:40 A. M. March 7th, 1913, with seven tourist sleepers Nos.

2542	1169
1129	1171
1060	1082
1085	

The first six of these sleepers had been used in handling troops from Fort Monroe to Washington and return, account Inauguration. Sleeper 1085 left Cincinnati, O. March 4th, 1913, with recruits for Norfolk. All of these cars at time of accident were being moved dead-head to Cincinnati, on request of the Pullman Company, with the exception of car 1082 which was to be
35 delivered to the Kanawha & Michigan Ry. at Charleston, W. Va. There were no passengers occupying these cars.

Extra Freight 596 West, in charge of Engineman M. E. Lane and Conductor J. R. Shisler, had moved from Richmond to Doswell with several loaded cars for delivery to the R. F. & P., with instructions to pick up all empty coal cars at Doswell for the C. & O., and bring them to Richmond. They had arrived at Doswell, terminated their run with the loaded cars, and it was while engaged in shifting out these empty coal cars that this thing happened. The train handled no freight from Doswell to Richmond, running as Extra 596 East, as the empty coal cars were being brought from Doswell to Richmond to be put in line for the West Virginia coal fields. This particular train, Extra 596, terminated its run with the cars at Richmond.

ASA P. CARNAHAN, the plaintiff, being duly sworn, testified as follows:

By Mr. Allen:

Q. Mr. Carnahan, please state to the jury your given name?
A. Asa P. Carnahan.
Q. You, I believe, are the plaintiff in this suit which we are trying now?
A. Yes, sir.
Q. What was your age on the 7th day of March, 1913?
A. I was thirty-two years, three months and some days.

Q. What was the condition of your health prior to that time, and up to that time—your physical condition?

A. Well, my health was good; I had the best kind of health, and could stand the hardest kind of work in the way of firing an engine. I could do as much as any man; I was may be above the average man—average fireman, rather.

Q. In whose employ had you been prior to, and up to that date?

A. I do not understand you. Who was I running with, do you mean?

A. No, who was your employer?

A. Oh, the C. & O. I was employed as fireman.

Q. How long had you been fireman for the C. & O.?

A. About six and a half years.

36 Q. What class of firing did you do? Was it with the passenger service or freight service?

A. I did both.

Q. Just state to the jury now where you were, and what were you doing, about twelve o'clock on the night of the 6th of March, 1913, and thereafter?

A. Well, on the night of March 6th, 1913, I was called to fire Engine 199, on No. 97, to leave Main Street Station about 12 o'clock.

Q. Where? At Richmond?

A. Richmond, Virginia; with a dead-head equipment of tourists cars, from Charlottesville. As well as I recollect we left Richmond about 12:30, and we arrived at Doswell about 2 o'clock. We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal, the engineer used the proper signal to call the flag in, and the flagman came in and the proper signal was answered, and we proceeded, with a clear signal. There was no signal for orders. Under those conditions, that is, the signals we got, we are supposed to have the main-line movement and the right of track for about twenty-seven miles.

Q. To what point?

A. Pendleton, Virginia.

By Mr. Haw:

Q. You say the proper signal was given to call in the brakeman?

A. Yes, sir.

Q. State what the signal was?

A. Well, there are five blasts of the whistle to call the flagman in from the east, and when the flagman gets in he generally gives him a go-ahead signal like that (illustrates by motion of hand), and of course it is answered by two short blasts of the whistle.

By Mr. Allen:

Q. Well, you have stated that you started up in obedience to this signal, on the main line; then what did you do?

A. Well, after seeing that we had the main line movement, and

a clear block—that is, I mean, no orders for us, and it indicated to us that we had the block for 27 miles—I had nothing to do but begin firing the engine; in other words, I hooked the fire over and began to put in a little coal at a time—not but two or three shovelsfull—in order to keep up the pressure and get away from
37 there; it is up-grade, and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that up to the moment the collision occured, and had just got in a position to get up on the corner of the seat box to reach for the bell cord; I don't remember whether I ever got hold of the bell cord or not, but that was my intention, to reach far en-ugh to get hold of the bell to give it a pull, and by that time we run into those cars.

Q. What did you run into, so far as you know?

A. Well, my understanding is that we run into some fifteen or eighteen cars, some empty and some loaded.

Q. You say that is your understanding; when did you learn what was the nature of the object you hit there?

A. When did I learn that.

Q. Yes. I mean was it since you struck it, or before you struck it?

A. Oh, since we struck it; it was some minutes—sometime after we struck the cars. I heard them say that night, before I was ever gotten out, what caused the accident.

Q. Did you, or any member of your crew so far as you know, have notice that these cars were on the track there in front of you?

A. No, sir, none whatever.

Q. Well, when the collision occurred what happened to you?

A. I was caught between the tank and the boiler-head; the tank crushed everything and came right up against the boiler-head.

Q. What part of your body was caught?

A. I was caught from my knee down—jammed against the boiler-head.

Q. Which leg?

A. Right leg.

Q. What happened then?

A. I began to suffer; my leg began to roast—burn—and I suffered immensely; there is no way of getting at that.

Q. Do you know how long it was before they got you out?

A. No, I do not. They claim it was some forty-five or fifty
38 minutes—those that got me out. It seemed like it was indefinite to me.

Q. Well, now, what became of you after they got you out?

A. Well, as soon as they arranged to get me out, I was taken down off of the engine by several of them and taken around and put into a small house, there, I believe they call it a supply room, may be, perhaps; I am not sure they call it that, but I think that is what it is; and they got a doctor as soon as they could, and he began to dress my leg and treat it as best he could, I suppose, under the conditions; he had mighty poor light; I was suffering awfully.

Q. How long did you stay there, and where did you go from there?

A. I don't know just what time we left there, at all; the only thing I know, we arrived at the hospital about 8:15 the next morning.

Q. What hospital did you go to?

A. Grace Hospital.

Q. In Richmond?

A. Yes, sir.

Q. Well, what happened to you there, Mr. Carnahan?

A. Well, as soon as I got there—I was suffering so—it was not long, it seemed to me like, before they began to take the bandage off that this doctor up here had bandaged the limb up, and treated it, and give me something to make me rest easy, and they kept that up for several days; it was amputated on the 12th.

Q. Your leg was amputated on the 12th?

A. Yes.

Q. Now just describe to the jury—and I want it for this record as well—the point at which they did amputate your leg; how far above your knee, and how far below the crotch?

A. Well, you can see I have on a reducer here. Some of you gentlemen, if you feel like it, can feel the end of it; it comes up to about there (indicates).

Q. What distance is that from your crotch?

A. I suppose it is, may be—I couldn't say—I can guess at it—I suppose some eight or ten inches.

Q. Now what is the character of the stub of your leg there, with reference to the muscle and flesh on it?

A. Well, the muscle and flesh is still there yet; it is not shrinking but very little.

Q. Can you show the jury? Remove your pants leg, and show the jury just what condition the limb is in?

39 A. Why, yes, I can do it.

Q. Well, I would like for you to do it, unless there is some objection to it, just remove your pants leg, Mr. Carnahan?

NOTE.—Witness here exposed the stump of his right leg, to the view of the jury.)

Q. Now, Mr. Carnahan, what is the cause of that dark spot which is apparent there?

A. That is where it has been breaking and running; it will practically heal for some ten or fifteen days, or may be more, and then will puff up there and run; just a few days ago it run some; that is a scab there now. That is where I have been treating it in order to get it as tough as possible. The trouble with an artificial limb is, when you put this in it carries the flesh with it, and the skin comes off that bone down there, and you can't stand it.

Q. Have you tried an artificial limb on there?

A. Yes, sir.

Q. You say it presses the flesh and muscles back and leaves the bone exposed?

A. Yes, sir, just skins the flesh over the end of the bone; when you put your weight on it, or put any weight on the limb, it catches it likes that as you put it in; and as soon as you get the least weight on here you have to stop, you can't stand it on account of that soreness in there, and being irritated and running some.

Q. You mentioned having a "reducer" on there; what is that?

A. A reducer is to keep this limb laced as tight as you can stand it and get it to shrink and settle, so you can wear an artificial limb.

Q. Why was it necessary to shrink that?

A. Well, the object in shrinking it, if it continues to stay fleshy, like this, I will never be able to do anything with the limb; it must shrink and get down to hard, firm flesh, in order to stand the pressure; you have got to put it in the socket of the artificial limb.

Q. When you were arranging for that artificial limb what was the relative size of that stub and the other leg right opposite?

A. Well, it measured an inch larger than my natural leg—than my good limb, in other words.

Q. State, while we are on this subject, what you have tried to do in order to get a limb that you could wear?

40 A. Well, I have been trying all I know how to make a success of the one I have. I have seen those people several times and they have made different changes; the last change they made they thought it would help me some—they cut the socket out in order to take the weight off of this end here, and throw it up in the crotch, but you can't stand but very little of it in the crotch; it rubs and get- you sore in a very little while; there is too much weight all in one place.

Q. Mr. Carnahan, I understand from you that you have been trying to adjust a limb there so as to relieve yourself in moving, and that you have up to this time been unable to do so?

A. Yes.

Q. What effect have you experienced from that injury, if any on your nervous system?

A. Well, I have had several nervous attacks, have been very nervous, and so that I could not rest at night.

Q. Did you have similar attacks prior to the time you were hurt? Did you have any attacks of that kind then?

A. No, sir.

Q. How soon after this injury did the first attack occur?

A. Well, as soon as I began to get around on crutches, to amount to anything, I was just nervous.

Q. Mr. Carnahan, state whether or not you suffered any inconvenience from the loss of that leg, in the way of other pain or suffering?

A. Oh, it hurts me right much at times now—pains; it has been for the last day or two paining some.

Q. State whether or not that is a situation you have found yourself in since the injury.

A. Yes, sir.

Q. Just tell the jury something about the recurrence of those pains, whether they are frequent or at long intervals?

A. Well, I don't have them every day or every night, but it has been when it comes somewhere near ready to run a little bit—a day or two before, or a night or two before, it will begin to throb and ache some.

Q. What effect has that injury had upon your earning capacity up to this time? State whether or not you have been able to earn anything since?

A. No, sir, I have not been able to earn anything, or do anything.

41 Q. You have stated that you were fireman for about six and a half years; state to the jury whether you have any other profession or trade that you might follow in lieu of your railroad profession?

A. I have none whatever.

Q. You have stated, I believe, that a fireman in the capacity you were in, was making about $100.00 a month? Did I ask you that question, or not?

A. About one hundred dollars a month.

Q. You have stated also that you stood for promotion?

The Court: I don't think he has said anything about that.

Q. You say you have been firing for about six and a half years; state whether or not you had prospect of promotion?

(Objected to and withdrawn.)

Q. Please state whether or not under the system adopted by the Chesapeake & Ohio Company, the firemen in good standing were in line for promotion, to become engineers?

(Objected to and withdrawn.)

Q. Now, Mr. Carnahan, state whether or not there was a system of promotion, from firemen to engineers, in operation by the Chesapeake & Ohio Railway Company, at the time you were with them?

Mr. Carter: We object to that, as it deals with speculative questions.

The Court: I don't think it does; it is a question whether or not it is a fact; it is for the jury to determine.

Objection overruled. Exception by defendant.

A. Yes, sir.

Q. Mr. Carnahan, state, if you know, what enginemen on the C. & O., both of freight and passenger trains, were being paid, at the time of your injury?

(Objected to; objection sustained: question withdrawn.)

42 Q. Mr. Carnahan, coming back to the time that you arrived at the east signal at Doswell, let me ask you what system of signals the C. & O. used; what system was in use at that time?

A. The block system.

Q. Now just tell the jury briefly what the block system means?

A. Well, the block system is this: they have different locations

of offices—telegraph offices—located along the line, which when you arrive there you either get orders, or it shows a red board; or if a block is white it indicates to you that you have a clear block to the next block station.

Q. What do you mean by a "clear block"?

A. That means it shows white; that is at night it shows white.

Q. When you get a white signal?

A. Yes, a white signal.

Q. That means you have a clear block?

A. That means you have a clear block to the next block station.

Q. It means that you have a clear track?

A. Yes, a clear track.

Q. When you approach a block and get a white signal, what is it the duty of your train then to do?

A. To proceed.

Q. When you approached Doswell and got to this east signal—state to the jury how far that was east of the R. F. & P. Crossing there?

A. Well, fourteen rail lengths.

Q. What would that be in feet—just approximate it as well as you can?

A. Four hundred and twenty feet; about that.

Q. What was the distance across the R. F. & P.? I believe there are double-tracks there—what was that distance?

A. It is about twenty-five feet.

Q. By the way, let me show you this thing—we can come at it better, perhaps, from this. (Here produces a drawing.) This is not designed as an accurate map, but just so that the jury may get a general idea of the situation there. Now, Mr. Carnahan, this direction is east (indicates on map). Point out there the signal post at which you get the signal first?

A. We stopped about at this point (indicates), and we
43 found it in this position, which means red—indicates stop. This paddle there is the one we got, right here (indicates).

Q. That is the east signal you got, red?

A. East signal.

By Mr. Leake:

Q. The far signal?

A. Yes.

By Mr. Allen:

Q. That signal stopped you?

A. Yes, that signal stopped us.

Q. Then after you stopped, what did you get from that signal before you started?

A. We got this top one—the white one, on top; changed from red to white, which indicates pass; no orders here. We had no orders here at this tower.

Q. Indicate the tower.

A. There were no orders at the tower; under those conditions we had main-line movement, clear block to the next block station.

Q. Is that what those signals would have meant to you down there?

A. Yes, sir.

Q. Now you say that east signal was 420 feet about, east of the R. F. & P. Crossing?

A. Yes, sir.

Q. And what is the distance across the R. F. & P. tracks?

A. Twenty-five feet, about.

Q. Then what is the distance from the tracks to this public road crossing here west of the depot?

A. Six hundred and ninety feet.

Q. How did you ascertain that measurement—by rail count or measurement?

A. By the rail count.

Q. Now what is this siding running out from west of the road crossing, in a northerly direction?

A. That is what they call the North Y,—a new Y.

By Mr. Leake:

Q. There are two tracks there?

A. Yes, sir, two tracks.

By Mr. Allen:

Q. Now what is the siding running out just east of the public road, in a northerly direction, by the tool house?

44 A. That is the depot track—running to the freight depot.

Q. Now, Mr. Carnahan, the track west of the house, between the tool house and the depot, on the north side of the main C. & O. line, crossing the road and entering the main line above here (indicates)—what is that track called?

A. Passing siding.

Q. Now where were these dead-head cars standing on the main line, so far as you know?

A. Well, my understanding is they were about at that road crossing.

Q. There is a side-track leaving *the* south of the main line, just west of the public road crossing, and extending east nearly to the depot; what is the name of that track?

A. South siding.

Q. Then there is a track extending from that, in a southerly direction, into the R. F. & P. tracks; what is that named?

A. That comes under the same heading, south siding.

Q. Is there not something about the "South Y," in there?

A. South Y—well, South Y you can call it.

Q. Mr. Carnahan, who was your engineer on 97 the night of this occurrence?

A. Mr. E. L. Bailey.

Q. Who was your conductor?

A. Captain McGraw.

Q. Who were your brakemen, if you had any?

A. Mr. Gibson and Mr. Clark.

Q. Do you know anything about the crew that was there as Extra 596, who put these cars on that track there—the dead-head cars?

A. My knowing that they were there, do you mean?

Q. Yes.

A. Yes, sir, I knew they were there; I saw them when they came around the R. F. & P. siding and backed into the south siding there.

Q. Where were you when you saw that?

A. Standing at the east signal, at the red board.

Q. Who was the crew on that train, do you know?

A. Captain Shisler was the conductor, and Mr. Blue was one of his brakemen, and Mr. Wilkinson was another brakeman; the engine crew was Mr. M. E. Lane, engineer; and Mr. Len Hartman, fireman.

45 Q. Now, Mr. Carnahan, what sort of a night was the night you arrived at this signal? Was it a bright night or a dark night?

A. It was rather a dark night; seemed to be unusually dark.

Q. State whether or not it was possible for you to have seen the cars from this east signal here, that were blocking the main line at that road crossing, under the conditions of darkness there?

A. No, sir, I could not have seen them.

Q. Did anybody advise you or any of your crew, or did you have any reason to believe or suppose, that there were cars standing on the main line about that road crossing up there?

A. No, sir, none whatever; didn't know anything about it; had no message or any notice of any kind.

Q. Did you have any intimation or warning, after your engine started, that there were obstructions up there?

A. No, sir.

Q. You have stated that your recollection is that you stopped firing and reached for the bell cord, and you don't know whether you got it or not; just state to the jury why you were ringing that bell, or wanted to ring it?

A. Well, after going the distance we had gone, I was under the impression we were somewhere near the road-crossing, and for that reason I was aiming to reach the bell to give it a pull.

Q. For that public road crossing?

A. For the public road crossing, yes.

Q. I wish you would state to these gentlemen whether or not you had rendered the company efficient and satisfactory service as fireman, and what your effort was in that direction, both in regard to learning the management of engines and in handling air?

A. Well, I could do it about as good as any of them—and rather better than the average.

Q. What do you mean you could do as good as any of them?

A. Run the engine or handle the air either.

Q. What do you mean by the "air"; probably the jury would not quite understand you?

A. The air is what you apply the brake with.

By Mr. Haw:

Q. And control the train with?

A. Yes, sir, control the train.

Q. The engineer has to do that, and the brakemen?

46 A. Yes, sir, the engineer does it.

By Mr. Allen:

Q. State whether or not you were making a study of that, and had passed examinations on that?

A. I hadn't passed any examinations, any more than through an air class they had here at the Y. M. C. A., at Richmond, by the Air Inspector. I had taken lessons there—written questions, you know, for us to answer.

By Mr. Carter:

Q. I understand you to say that it was not your duty to do these things, as fireman?

A. No, it was not my duty, but I could do it.

By Mr. Haw:

Q. Don't the fireman very often have to handle the train?

A. We do do it very often in places where we switch—if you are a competent fireman, and the engineer knows it is perfectly safe for him to do it.

By Mr. Allen:

Q. I will ask you whether or not the company required firemen to study those things—to be proficient in air?

A. He will certainly have to study it if he ever gets promoted.

Mr. Carter: We object to that, on the same grounds as mentioned before.

The Court: I don't see the relevancy of the question, unless it is a part of his duty as fireman.

Mr. Haw: He said very often the fireman had to handle the train; that it is constantly done; and I know it to be a fact; I have seen it done.

Q. You stated that you had been taking lessons at the Y. M. C. A. Now under whose authority were you taking those lessons? Who was teaching you, and why were they teaching you?

A. They were teaching us to have the best results possible.

47 Q. Who was having that done? Who was paying this man to do that? Who was employing him to do it?

A. The Company.

Q. The Chesapeake & Ohio Company?

A. The Chesapeake & Ohio Company—that is my understanding.

Mr. Leake: We object to that. He has not stated that it was in the line of his duty. We do not think its relevancy towards any line of promotion should be admitted in evidence, and we move to exclude it.

The Court: I don't see how it would likely affect the question of damage, if that is what you are after:—any idea that he would be promoted because people generally were promoted, of course seems

to be merely speculative, and not evidence to show that he would be promoted.

Mr. Allen: Very well, sir; we will let Your Honor strike out what Your Honor thinks proper to strike out.

The Court: That part ought to be stricken out that is introduced for the purpose of showing damages other than in his capacity as fireman, I think—any that is merely speculative.

Cross-examination.

By Mr. Carter:

Q. Mr. Carnahan, you stated that you knew there was a crew of another train at Doswell that night, did you?

A. Yes, sir.

Q. You knew then there was another train there?

A. Yes, sir.

Q. Did you know what sort of a train it was, whether it was a passenger or freight?

A. Well, I presumed from the class of engine that it was a freight train.

Q. Did you know that that train was shifting and standing around there, or did you know what it was doing?

A. Well, I can not say that I did know what it was doing; I could not see the movement, or what they were doing.

Q. You were uncertain whether that train was standing there to let you go by, or whether it was shifting cars—pulling them
48 in and taking them out? Were you uncertain about that matter?

A. He was standing, as best I could see, when we got the white signal to proceed.

Q. Could you see the train?

A. I could see the engine.

Q. Whereabouts was the engine?

A. The engine was standing on that South Y.

Q. Was the engine facing towards you?

A. Yes, sir, headlight facing east.

Q. Was that train coming east?

A. That is my understanding.

Q. Did you see what cars were behind it?

A. No, sir.

Q. Now a C. & O. engine on the South Y could only get back on the main track by backing, and going on to the main track, could it not? It could not pursue the South Y and get on to the Chesapeake & Ohio track?

A. Why, he had to go through the North Y, and down the R. F. & P. siding, and back up the South siding.

Q. That would be a very roundabout way to get back on the main line track, would it not?

A. That is what he would have to do, to get his engine turned around.

Q. To come down on the Fredericksburg track, and get on the North Y, and come in?

A. No, my understanding is that he backed through the North Y, out on the R. F. & P., down the R. F. & P. sidetrack and back into the South siding.

Q. That is the way you thought he got there?

A. Yes, sir.

Q. Well, now, you said these cars—were they the cars that had been attached to that train?

A. My understanding was that they had been.

Q. Now you say they were there about the road-crossing, when you struck them?

A. Yes, sir, that is my understanding since—that they were standing about the road-crossing.

Q. They were not standing across the road, were they?

A. Well, I didn't say across the road; I said about the road crossing.

Q. It is not usual or proper for a train to stand across a crossing, is it?

49 A. No, sir.

Q. The crossing of the county road, I mean?

A. Yes, the crossing has no right to be blocked.

Q. Then they were not on the east side of the county road, were they, towards the R. F. & P. tracks?

A. No, they would be west.

Q. So that if they were at the crossing they must have been immediately west of the crossing of the road?

A. Yes.

Q. Now you say you had gotten up to ring the bell for that crossing, at the moment you struck the cars?

A. Yes, sir.

Q. You think you had just gotten up, but had not reached the bell?

A. I don't remember having reached the bell cord.

Q. How far do you generally ring—or, is there a rule for you to ring the bell before you get to a railroad crossing or public road crossing?

A. Well, may be two hundred feet of the crossing, or something of that kind.

Q. Yes. There is a statute about it, and I thought there was a rule of the railroad; it was your duty as fireman to ring that bell before you got to the crossing.

A. Not necessarily so.

Q. It was not your duty? Who rings it, if you don't, if it has to be rung?

A. Well, the cord is attached there very near as convenient for the engineer to ring, as me.

Q. Do you mean to say that it is the engineer's duty, and not the fireman's, to ring it?

A. No, sir, I don't.

Q. Is it not the fireman's duty to ring the bell, and the engineer's to sound the whistle?

A. The engineer is supposed to sound the whistle——

Q. Who rings the bell?

A. —and he rings the bell sometimes; the fireman rings it if he has time—if the engine is drifting. and not raising steam.

Q. In other words, he just rings it when he is at leisure, is that your idea of it?

A. Yes, sir.

Q. Do you get any instructions from the Company, along that line, only to ring the bell as you approach a crossing when you are at leisure?

50 A. I think the rule will explain it to you.

Q. You are familiar with the rules, are you not?

A. No, sir, I am not altogether familiar with them.

Q. Did you have them?

A. Yes, sir.

Q. And sign receipts stating that you had read them over, when you accepted employment?

A. Oh, yes, we are supposed to be examined on the book rules.

Q. Now, this is the form of receipt—and by the way, I believe they have your signature to it—here is your name*d* signed: "Received January 6th, 1906, of the Chesapeake and Ohio Railway Company, a copy of the 'Rules Governing Employes of the Chesapeake and Ohio Railway Company, in effect January 1st, 1899,' containing conditions of employment and rules governing its employes; all of which I promise to read carefully and to comply with their stipulations." Signed, "A. P. Carnahan," and witnessed. That is your receipt, is it not?

A. I think so.

Q. Now that is one of the rules of 1899. Is there any change in them, in this respect, up to this year?

A. No, sir, none that I know of.

Q. Now that rule says, with reference to ringing the bell: "The engine bell must be rung on approaching every public road crossing at grade, until it is passed; also when passing stations and through tunnels. The whistle must be sounded at all whistle posts." That is right, is it not?

A. That is right; but wait a minute. Does it say who shall do it?

Q. No, but I was asking you about that, and you say the engineer must do it. It is your habit to ring the bell before you get to a crossing, and you were fixing to ring it then?

A. That was my intention.

Q. And it was your duty, was it not?

A. I can't say that it was any more my duty than the other man's.

Q. You think it was the duty of both of you, then?

A. I think so.

NOTE.—The Court here took a recess for dinner, until 2 o'clock P. M., and upon reconvening the same witness was further cross-examined as follows:

51 By Mr. Carter:

Q. Mr. Carnahan, it is your duty, as well as that of the engineer, to look out in front for obstructions and other matters on the track, is it not?

A. As far as I can. That is, Mr. Carter, I reckon I will make it a little plainer to you—as far as I had the time. Now the night of this accident it was necessary for me to fire this engine and to keep constantly after this engine, because we had on an old type of engine, and a small one, and we had a very heavy train for that class of engine, and I was constantly firing it—had to put in may be from one to three shovelsfull of coal, something like that—had to keep the pressure up, and keep the train from being stalled; and when we left there I was under the impression that we had a clear block for 27 miles, nothing to obstruct us that I knew of.

Q. But it is your duty to look out?

A. Yes, it is my duty, as far as I have the time to spare—when I am not otherwise occupied in trying to keep the engine hot.

Q. Mr. Carnahan, did I understand you to say that you had a right to rely on the block system, and disregard any other rules and regulations and cautions in running, if the block signal indicated a clear track ahead of you?

A. What do you mean?

Q. Did you in your testimony state, or mean to convey the impression that when there was a block signal—white signal—that you had a right to disregard all other precautions which you might otherwise take, and run the train as if you knew there was nothing ahead?

A. No, sir, not in every case I did not.

Q. You did not mean that in every case?

A. No, sir.

Q. Now I will read you Rule 301, about block signals, which is in this little book that you state you are familiar with: "Block Signals, unless otherwise provided, do not affect the rights of trains under the time-table or train rules, nor dispense with the use or the observance of other signals whenever and wherever they may be required." That is one of the rules you were running under?

A. That's right.

Mr. Carter: That rule is offered in evidence by counsel for the defendant, as well as the rule read sometime ago—Rule 31—as to the ringing of the bell.

52 Redirect examination.

By Mr. Allen:

Q. Mr. Carnahan, you were asked something about whether or not you saw that engine on the South Y, and you stated that you saw that engine there—it was headed east, with the headlight on it?

A. Yes, sir.

Q. State whether or not you saw anything else, beyond that engine, up this way?

A. Well, I couldn't say; I saw this engine at the time, before we

got the *movement* to move, when she backed in there and stopped, it seemed like, the best I could see; and of course after he got in that position in there and stopped, why then we got our red signal, came white, and that meant for us to proceed.

Q. What was there about that engine that caused you to see that?

A. I just happened to see the view looking in that direction—looking west from where we were standing.

Q. You say the engine was headed east?

A. Yes, sir.

Q. Was there any light about the engine?

A. The headlight—that was the only thing I could say that I could see, that I knew this was an engine—the headlight on it.

Q. Will you tell me where, on this South Y, this engine was standing? Here is the signal (indicates).

A. I can say he was standing along in there somewhere, where you have that pencil (indicates).

Mr. Leake: Indicate it, in the record.

Witness: I couldn't state now where that engine was, but it was about there (indicates) as near as I could state.

By Mr. Haw:

Q. And you were off here on the main line?

A. Yes.

By Mr. Allen:

Q. It was not quite half-way between the R. F. & P. track and where this siding went into the other siding—where the South Y entered the South siding?

53 Mr. Carter: Does he say that?

Mr. Allen: He indicated the point. Mr. Leake wanted it indicated on the record.

A. I would suggest about that; that is the best I can come to it.

Q. Mr. Carter has read a rule to you respecting the ringing of the bell of an engine while passing a station, and approaching public road crossings. I wish you would state to the jury just what you were doing from the time you left the signal post—the east signal—until you passed through up here and had that collision. Just state what you were doing?

Mr. Carter: Now, Your Honor, he has stated that more than once, I think.

The Court: He has stated generally; I don't know whether there is anything in the record to show what he was doing all the time.

A. You want me to state now how my time was occupied from the time I started?

Q. Until you reached for that bell cord?

A. Well, after we got the white signal, that meant to us a clear block, I noticed ahead that there were no orders for us—that is the order signal—it displayed the white signal; as soon as the engineer opened up and got his train started I began to work on my fire; we

have what we call a "hook"; I hooked the fire over and got it burning bright, and began putting in coal and feeding it, allowing the door to be shut may be for a moment; and did that up to the time we had gotten up there somewhere where I thought we were near the crossing. It is my habit to try and ring the bell for these places, if I can, and my intention was to get the bell cord, but whether I got hold of the bell cord, or not, I am not able to say.

Q. Now when you opened that door to put in coal, or hooked the fire over, as you called it, on that night which you say was dark, what effect did that have on the light in the cab?

A. Why, it throws a great reflection all in the cab; for a minute or two after the door is closed it blares, and you can't see anything ahead of you or around you.

Q. Do you mean it affects your eyes that way?

54 A. Yes, sir, affects your eyes that way.

(Witness here stood aside.)

WILLIAM MCGRAW, being duly sworn on behalf of the plaintiff, testified as follows:

By Mr. Allen:

Q. Captain, in whose employ have you been for the past few years?

A. The Chesapeake and Ohio Railway Company.

Q. In what capacity?

A. As conductor.

Q. Are you a conductor of freight or passenger trains?

A. Freight and passenger—freight train.

Q. Where were you on the early morning of March 7th, 1913?

A. I was on train No. 97 out of Richmond, on the way to Charlottesville.

Q. When you got to Doswell, Captain, did anything check you up there?

A. Yes, sir.

Q. What was it?

A. Semaphore signal—red signal.

Q. Was that at the east of this R. F. & P.—this semaphore?

A. Yes.

Q. What did that red signal indicate, in railroad parlance?

A. Stop.

Q. How long did you remain there?

A. Five to seven minutes.

Q. Then what kind of a signal did you get?

A. White signal.

Q. What did that indicate?

A. Proceed.

Q. Was that white signal a signal for the use of the main track ahead of you?

A. How's that?

Q. Did the white signal at that time indicate to you that you had the use of the main track ahead of you?

A. Yes, sir.

55 Q. Are there any other signals there about the tower building, that you have to watch when you go by there?

A. Yes, sir; train order signal.

Q. Where is that located?

A. On the tower.

Q. The tower, I believe, is the place where the operator and signal man works, is it?

A. Yes, sir.

Q. Captain, do railroad employees in the movement of trains get their signals at that point?

A. How is that, Mr. Allen?

Q. Do the C. & O. employees, in the movement of trains, get their signals from that point—that tower—as they pass Doswell?

A. They get their signals from the tower.

Q. From the agent or employe in that tower?

A. From the employe in that tower.

Q. What did the order display on the morning of the 7th, that we are speaking of?

A. White.

Q. What did that mean, sir?

A. That there were no orders for us.

Q. Well, then, what did your train do when you saw that white signal?

A. Started off—proceeded, sir.

Q. West?

A. West.

Q. Then what happened after that?

A. We collided with a cut of cars.

Q. Captain, do you know where those cars were located? Could you tell us about where they were located? We have a drawing here of the situation, if you would like to look at it. (Drawing is here again produced.)

A. I can show you, may be, from that. It was at the county road there, right on the crossing.

By Mr. Haw:

Q. Which side was the point of collision, in the road?

A. My recollection is right in the road.

Q. Did you notice after the engine——?

A. Our engine was on the road crossing.

Q. Did it stop immediately it struck it, or did it push the others back a little?

A. Well, it pushed the others back, I guess.

56 Q. How far?

A. I don't know how far; they were back from the engine a little ways, may be, I don't know.

Q. It pushed them back after they come in collision?

A. Yes.

Q. And the engine stopped on the crossing?
A. Right on the crossing.
Q. On one edge of the road-crossing, or in the middle of it, or how?
A. Right on it, as well as I recollect; the front part of the engine was, as I recollect, right on the crossing.
Q. And had pushed the other train some distance, after the collision?
A. They had been knocked back.
Q. How far did the engine move after the collision?
A. I don't know.
Q. Did it move any?
A. It came to a ram, and stopped, I suppose; I don't think it did.
Q. What became of you?
A. Well, I remained in the cars as well as I could; I was bounced around a little.
Q. They evidently came into collision then before you reached the road crossing?
A. Right on it.
Q. You say they stopped on it, I think?
A. They stopped on it; that is, where it hit—as well as I recollect.
Q. When those signals are given to a train for moving, does the engineer start the engine without *without* signal from you, or do you have to signal?
A. They are supposed to get a signal from the rear.
Q. I know, but if he sees the light does he move right off, or wait until he gets a signal from you?
A. He can move off, but he got a signal from the rear of our train, before he moved.
Q. Did he get it from you?
A. He got it from my flagman.
Q. Who was that?
A. The flagman protecting the rear of the train, he was called in by the whistle.
Q. He was called in by the whistle?
57 A. Yes, sir.
Q. Then what signal did the engineer get?
A. He got a proceed signal, with a lamp, from the flagman.
Q. So then the engineer had not only the white light at the starting point, where he got the signal to start, but he also had the signal from the flagman who was called in; then he saw no signal to stop for orders, so there was nothing else for him to do but to go ahead, was there?
A. Go ahead.

By Mr. Allen:

Q. How fast was the train running?
A. I suppose about ten miles an hour.
Q. You say that the engineer called in the flagman by the whistle. How many blasts do you give to call in the flagman?
A. Five.

Q. What do those five blasts indicate to parties who know that a train is standing still—I mean the railroad parties?

A. That it calls in the flagman.

Q. Now where a train is standing under a red signal, and the flagman is called in by that means, what do they understand is going to be the movement of that train?

A. Proceed.

Q. Captain, do you remember what kind of a night that was, whether it was a dark night, or not?

A. No, I don't remember about how dark it was. I do remember it was a very cold night.

Q. What condition did you find Mr. Carnahan in after the collision?

A. I found him pinner between the tank and boiler.

Q. How long did he remain in that position, before you could get him out, Captain?

A. About forty-five minutes, I think it was.

Q. Did any one notify you of the presence of those cars standing on the main track ahead of you up there?

A. No, sir.

Q. Captain, was it possible for you to have seen those cars from the time when you stopped down here, if you had looked from that point up this way, that night?

(Objected to, and withdrawn.)

58 Q. Did you get out so that you could see around you, when your train was stopped down there?

A. I did not get out then; I raised a window and looked out.

Q. How far could you see westward along this main track, sir?

A. You see the engine and a car was between me and that, Mr. Allen—the track—I didn't see any on the track.

By Mr. Haw:

Q. Is there no curve in there?

A. It's a straight line.

By Mr. Allen:

Q. Something has been said about another extra train being in on these Y switches there that night. I wish you would state whether or not you knew of the presence of that train there?

A. No, sir, I did not; I had no notice of that train being there.

Q. If it be a fact, Captain, that that crew of the Chesapeake & Ohio Railway Company placed those cars on the main line, on or about this crossing, what would have been the duty of the conductor and train crew there in respect to protecting them by signals, as against your train or any other train?

A. Well, the duty would have been to protect it—it is an interlocking plant, and I don't know what arrangements they made.

Q. I understand, but what would be, under the rules of the company——

A. It would be the duty to protect it.

Q. In what way, Captain?
A. With flags, of course.
Q. Or lights—at night?
A. Or lights—well, flags—that means lights.
Q. Do you know whether or not there were any flags or lights indicating the presence of those cars up there?
A. I don't know.
Q. I believe you have stated that Mr. Carnahan was caught between the tank and the boiler head; will you state about how long he remained in that situation?
A. I said about forty-five minutes.
59 Q. State how you finally got him loose from there, if you please?
A. Well, we tried every way; we took an engine, it was on the siding next to that track, and attached a chain—a large chain—to some cars and to the tank, and pulled it back off of him and released him.
Q. Which track was that engine on, the South Y?
A. The South Y.
Q. Then to do that you would have to bring it over the South Y, on this south siding?
A. It was already on there.
Q. Was already on the siding, or on the South Y?
A. It was on the South Y siding.
Q. How would they bring it up here (indicates)?
A. Just back it up to the crossing. We didn't get the engine back that far; there were some cars attached to the engine, and we put chains to a car and pulled the cars with the engine.
Q. And then had to pass from that South Y there, and come in on this south siding——
A. It was already in the South Y.
Q. But I say they had to come from the South Y into the south siding?
A. I don't know how he got in there.
Q. It was already on it when you passed?
A. It was already in there when we passed.
Q. You had to pass by this engine when you came up here where you had your engine, didn't you?
A. Yes, sir; our train had not entirely passed it, but the engine had.
Q. And really you went on by that engine?
A. Yes, sir.
Q. Captain, of what was your train composed that night?
A. Passenger equipment.
Q. What kind of cars were they?
A. They were tourist cars.

Mr. Leake: We have admitted all that.
Mr. Allen: Well, that is so; there is no need of going into that. You admitted that there were eight, did you not?
Witness: There were seven tourist cars, and a coach.
60 (Witness here stood aside.)

J. R. SHISLER, being duly sworn on behalf of plaintiff, testified as follows:

By Mr. Allen:

Q. Captain, in whose employ were you about the 7th of March, 1913?

A. C. & O.

Q. How long had you been in the employ of that company?

A. A little over eleven years.

Q. In what capacity were you working?

A. Conductor, at that time.

Q. Freight or passenger?

A. In the freight service.

Q. Where were you running particularly—I mean on what division were you running on the morning of the 7th of March?

A. Between Richmond and Charlottesville.

Q. Where were you about two o'clock in the morning of that day?

A. At Doswell.

Q. When had you come to Doswell?

A. I arrived at Doswell about 11:37 that night, P. M.

Q. What was the number of your train, sir?

A. Extra 596, to Doswell.

Q. Did you see 97 when it arrived there, or soon afterwards?

A. No, sir, 97 had arrived there before I seen it, but I seen it a few minutes after it arrived.

Q. Where was it when you saw it?

A. It was standing at the home signal, just below the telegraph office.

Q. You mean by that the signal post east of the R. F. & P. track?

A. Yes, sir.

Q. How long did 97 remain at that signal, do you think?

A. I could not say—something between five and ten minutes, I suppose.

Q. Captain, something has been said in this evidence about a collision with cars left about the public road crossing there at Doswell, on the main line. Will you be kind enough to tell the jury about that? Just tell them in your own way?

61 A. Well, I had fifteen cars on the main line at that time; I think it was about fifteen—fifteen or sixteen, I would not say just which, now, but about fifteen I think it was, standing on the main line.

Q. Was there a caboose attached to the west end of those?

A. Yes, sir.

Q. Was there anything attached to the east end? Did you have an engine to that?

A. No, sir, the engine was in the side-track.

Q. How long had those cars been there, Captain?

A. I could not say exactly, something between thirty minutes and an hour, I would suppose; that is, a part of them; a part of them I had just put out there

Q. Captain, I would be glad if you would state whether or not the signal man in the tower there knew of the presence of those cars on the main line?

A. He did, sir.

Q. How do you know that he knew of that?

A. Because I had arranged with him to do my switching there, and also arranged with him to turn that train through the side-track.

Q. To turn 97 through the side-track?

A. Yes.

Q. Captain, were you protecting the front of those empty cars there on the main line, by signals of any kind, when 97 approached?

A. Nothing more than through the operator and this home signal.

Q. The home signal—that was the signal east of the R. F. & P.?

A. Yes, sir.

Q. Do you remember, Captain, whether it was a dark night that night?

A. Well, I couldn't say just concerning the darkness, but I think it was tolerably dark. I don't remember now just how dark it was, but it was a dark night—the moon was not shining.

Q. Captain, do you recall what was the character of light, if any, on the front of engine 199, that was drawing train 97?

A. On engine 199 I think it was an oil light.

Q. Oil lights, I believe, are not as brilliant as the electric head-lights?

A. Oh, no, sir.

62 Q. Captain, those fifteen or sixteen cars that you say were located on the main line—just state, if you can, sir, where they were left standing, about at what point?

A. Just about the road crossing, to the west switch—the rear of them was about at the west switch, so as to clear the side-track switch—and from there extending towards the office.

Q. Did you see Mr. Carnahan after this collision?

A. Yes, sir.

Q. What position was he in when you saw him?

A. His foot was caught between the boiler head and tank.

Q. How long did he remain in that situation?

A. I couldn't say just how long, Mr. Allen; I think it was something like thirty or forty minutes, or may be more, I couldn't say just how long.

Cross-examination.

By Mr. Carter:

Q. How far were you, Captain, from the engine on the train on which this gentleman was hurt, when you saw it stop? How far were you, at the time?

A. You mean after it struck?

Q. No, sir, when you first saw it, when it was standing east of the R. F. & P.

A. When I first saw the engine I was about at the telegraph office.

Q. About how far is that?

A. I couldn't say just exactly how far that is; it is something like fifteen or eighteen rail lengths, I suppose.
Q. How long are the rails?
A. The rails range from twenty-eight to thirty feet.

Redirect examination.

By Mr. Allen:

Q. In speaking of seeing the engine at this east signal post, state whether or not the headlight was in view from the point from which you saw it?
A. From the office, where I seen it? Yes, sir, the headlight was in view.
Q. What do you call the office?
A. The telegraph office.
Mr. Haw: Is that this high up one?
63 Q. The telegraph office is in the tower, I believe?
A. Yes, sir.

By Mr. Haw:

Q. Were you up in that tower?
A. I was up in that tower.

(Witness here stood aside.)

T. D. BLUE, being duly sworn on behalf of plaintiff, testified as follows:

By Mr. Allen:

Q. Mr. Blue, please state, sir, in whose employ you were on the morning of March 7th, 1913?
A. I was employed by the C. & O. Railway Company.
Q. In what capacity?
A. Rear brakeman on extra 596.
Q. How long had you been braking for the C. & O. Company?
A. About six years.
Q. Extra 596 was moving in which direction, sir, from Richmond?
A. It was moving westward from Richmond; it was headed westward.
Q. Where did you see train No. 97 that night?
A. I seen it at Doswell.
Q. What time was it; do you recall about what time of the night that was?
A. Somewhere about two o'clock.
Q. How long had you been at Doswell before 97 arrived?
A. About two hours and thirty minutes, something like that.
Q. What were you doing at Doswell, Mr. Blue,—your crew?
A. We were working at Doswell, getting cars out to bring them back to Richmond.
Q. You were making up a train to take back to Richmond?
A. Yes.

Q. In making up the train and putting the cars in line and taking them back to Richmond, where did you leave them, sir?

A. The cars that we got from Doswell to bring back to
64 Richmond, we pulled them out of the North Y and set them on the main line.

Q. Do you recall how many cars you had on the main line when 97 came up to the east signal post?

A. I know we had a number—I don't know positively, but I heard someone say there were fifteen.

Q. Mr. Blue, were any signals placed, or lights, to protect those cars on the main lin*t*, that you recall?

A. There were signals on the rear of it; after we set them on the main line we put a caboose car on the west end.

Q. You had a signal on the west end?

A. Yes, sir.

Q. Was there any signal on the east end?

A. No, sir.

Q. Was there anybody stationed there to warn other trains approaching from the east of the presence of those cars?

A. You mean——

Q. A flagman?

A. No, sir.

Q. Do you recall what kind of a night that was, Mr. Blue? Was it a dark or bright night?

A. I do not.

Q. Now when 97 moved out from that signal, which way did it proceed, sir?

A. It proceeded westward.

Q. Do you know whether or not the signals the order signal at the tower, and the signal at the east signal post—showed white?

A. I do not.

Q. Was there any way that 97 could have been put by your dead cars up here on the switches at that point?

A. Yes, sir.

Q. Which track would it have taken to have gone around your train?

A. Through the passing track.

Q. Here is a little sketch of it, Mr. Blue: taking this as the east end, towards Richmond, and this going west (indicates on sketch), is that the track you refer to as the passing track?

Mr. Carter: The one on the north of the main track.

Mr. Haw: The one next to the depot, is it not—next to the signal tower.

65 Mr. Allen: There is the signal tower (indicates), and here is the South Y, you see.

A. Our cars were standing in here (indicates), and 97—that is the tower there?

Q. Yes, that is the tower; this is the public road crossing here (indicates), Mr. Blue.

A. Well, our cars were standing—it was above this road crossing

somebody made—any way, our cars were standing between here and here (indicates).

Q. That is between the road crossing and the west end of the switches?

A. Yes, sir. 97 had instructions from the operator—I mean the operator had instructions to let 97 go through the side-track, and our cars were standing here above the road crossing.

Q. And this is the track you indicate as the passing track—the north siding running through there (indicates)?

A. Yes.

Q. Now who gave the operator those instructions?

A. I went up in the tower and remarked to conductor Shisler that 97 was standing down there, and they could let him go through the side-track; and conductor Shisler turned to Operator Beasley and says, "All right, let 97 go through the side-track and I will go up and look out for the switches"; and he and I walked out of the office; I started out ahead of him, and conductor Shisler run by me and said "Tom, you get those two cars, the rear cars at the South Y, and I will look out for the switches"; and he run by me, and our engine was coming back in the South Y, backing to the cars, and I was attending to the coupling of the cars, and I got up on top of the cars to let the brake off, and I heard 97 coming, and of course looked out and he was right on the R. F. & P. Crossing; and then I looked up to see, you know, if the track was lined up right, and I noticed it was not, and I jumped down between the cars, but didn't have time to get over on the other side, and I holloed on the fireman's side as it came by me; I didn't see any one, it came that quick, and was gone.

Q. How long was it after you did that before the collision occurred?

A. About half a minute, or a minute, or something like that.

66 Q. What was the speed of 97 as it passed you?

A. I really don't know.

Q. You don't know how fast it was going?

A. No, sir.

Q. What position did you find Carnahan in after the collision?

A. When it struck I ran up to the engine and looked, but the steam was blowing so I didn't see Mr. Carnahan at first, and went around the engine, and then I met—as I turned to come back I met Mason Lane, engineer of 596, and he told me Mr. Carnahan was fast in the engine.

Q. Just how was he fastened there? What was pinning him there?

A. The tank of the engine had his leg pushed up against the boiler-head.

Q. Do you mean by the "boiler-head"—is that the place against the fire-box?

A. Yes, sir.

Q. Do you recall how long it was before he was gotten out of there?

A. I judge from forty to forty-five minutes.

Q. You have spoken of being up in the tower house there, which

is the switch tower as well as telegraph office, with Captain Shisler. Who did you say was in charge of that office that night?

A. Operator Beasley.

Q. Who was operating the switches while you were in there?

A. It was a colored man pulling the levers; I didn't know whether he was pulling the signals or the switches—I don't know.

Q. Do you know who that colored man was, whether he was an employe of the company, or not?

A. I do not.

Cross-examination.

By Mr. Carter:

Q. Now I understand, Mr. Blue, that you state you had crossed the track, and were on the south side of the main track of the C. & O.—on the same side that the fireman was on—when you saw the train on which the fireman was, going up the main track of the railroad; is that right? You had crossed the track of the Chesapeake & Ohio?

67 A. Yes, sir.

Q. And had gotten on the south side of it; the south side is down towards Richmond?

A. Yes, sir.

Q. And that is the side the fireman was on, is it not?

A. Yes, sir.

Q. You saw the Chesapeake & Ohio train on which this Mr. Carnahan was, going west on the track on which you knew were these stationary cars? You saw that, didn't you?

A. I saw it when I was climbing up; I was clean on the other side of the two tracks—the South Y track.

Q. Yes; well, you were south of this track. You say you didn't have time to get across on the engineer's side?

A. I was on the other side of the cars, you understand. I was on top of the cars when I heard 97 coming.

Q. What cars were you on?

A. On coal cars in the South Y.

Q. In your train?

A Yes, sir.

Q. They were on the south side of the Chesapeake & Ohio main track. I don't mean they were right up at it, but they were south of it.

A. Yes, sir, south of it.

Q. You jumped down off of your car and ran up toward the train that Mr. Carnahan was on, and shouted, and waved them to stop, didn't you?

A. No, sir, I didn't run anywhere.

Q. You didn't run anywhere? Did you walk?

A. I jumped down off the cars and didn't have time to get across the track when I seen 97.

Q. You gave the signal to stop, did you?

A. I gave the signal—I holloed to shut off, just as he came by

me; the engine was right on me; I didn't have time to get across the track.

Q. How far were you east of the cars when 97 struck? When you gave the stop signal how far were you east of the cars that 97 struck—when you gave the stop signal to the crew of 97?

A. From the cars that were struck?

Q. Yes.

A. About eight or ten car-lengths.

Q. So that they were eight or ten car-lengths apart when you gave the signal to stop?

68 A. Yes, sir.

Q. Well, now, did you call at the same time that you gave the signal?

A. I holloed when he went by me.

Q. You holloed all you could?

A. Yes, sir.

Q. And the train that was on the main track, going into these other cars, was that about even with you when you gave the signal and holloed?

A. Yes, sir, right on me; I was between that and the cars.

By Mr. Haw:

Q. What do you mean—the engine of train 97?

A. I was between the cars that our engine had coupled to there, and 97, when they hit, and when I jumped down off the cars I didn't have time to get out from between them; I was in danger myself, standing in between 97 train when it hit, and the cars our engine was coupled to.

By Mr. Allen:

Q. As I understand, 97 engine was passing just as you got down there, and you holloed?

A. I saw it was coming up the main line, and I jumped down, and as I jumped down the engine was right on me, and I holloed to shut off.

By Mr. Carter:

Q. You had a lamp in your hand?

A. Yes, sir.

By Mr. Haw:

Q. You just waved it that way (illustrates), and you were on the left side of the engine?

A. Yes, sir.

Q. A man with his head down working, throwing coal into the engine, could he have seen your signal, do you think?

(Objected to, and not pressed.)

Q. How close were you to the engine?

A. I was right at the engine.

Q. So close you were afraid it would run over you?

A. I couldn't get across the track, no, sir.
69 Q. How high was the engine window above your head?
A. I don't know.
Q. What is your estimate of it?
A. I have no idea.
Q. It was above your head, was it not? You were standing on the ground?
A. I suppose it run along close to a man's head—the footboard.
Q. The walking board?
A. The gang board.
Q. Well, the cab window is higher than that board, is it not?
A. Yes, sir.

By Mr. Allen:

Q. When this engine was passing you, and you were trying to give this signal, was the engine running under steam?
A. Yes, sir—well, I was not handling the engine, but I would judge that it was.
Q. Well, you could tell by the exhaust?
A. Yes, it sounded to me as if it was; but at that time I didn't have the time to notice all those things.

Cross-examination.

By Mr. Carter:

Q. How many car lengths, Mr. Blue, was the car that you were on, when you saw this train coming back, from your engine—the engine on your cars? How many car-lengths was it behind your engine?
A. Two or three. The brake was setting very tight; we went to back up and could not move, and I went up on the car to let this brake off, when I saw the danger.
Q. About how long is a car?
A. A car runs from 28 to 34 feet, I think. I think these coal cars are about 28 or 30 feet—along in there.

(Witness here stood aside.)

A. P. CARNAHAN, the plaintiff, recalled, further testified as follows:

By Mr. Lane:

Q. Mr. Carnahan, you have stated that you were in Grace Hospital; how long did you remain in there?
70 A. About six weeks, or may be a day or two over that, I don't remember; but it was about that length of time.
Q. I omitted to ask you about the character of the headlight you had on your engine on the morning of March 7th. Just tell the jury whether it was an electric light.
A. No, we had the ordinary oil lamp—old style oil lamp, rather.
Q. Are those as powerful lights as the modern electric headlights?

A. No, sir; they give about headlight enough for anyone to know that there is a headlight on the engine: you can see it some distance.
Q. How about the light from behind the lamp, looking ahead?
A. Why, it don't amount to anything, you might say, as far as light is concerned, in seeing the track or anything.
Q. From the character of the injury you sustained, state whether or not you could fire an engine now?
A. You mean to fire an engine again—in the future?
Q. Yes.
A. I don't see any chance of it; I don't see that I could do it; I don't know; I don't see any chances of doing it, at all; I have not been able to wear a limb so far, and I don't know when I will be able to wear one.
Q. If you were wearing a limb could you fire an engine, with the speed and motion, and all that?
A. No, sir.

By Mr. Carter:

Q. Mr. Carnahan, was this the engine you generally ran—the one you were on that night?
A. No, sir.

By Mr. Allen:

Q. I don't know whether I asked you, or not, about the protection of that boiler head or fire-box; that is, whether or not on the outside of that there was any protection—asbestos or anything?
A. Nothing whatever; nothing but the naked iron.
Q. When that fire was burning in the engine, hot, what was its effect on that part where your leg was fastened?
A. Oh, it was as hot as blazes.

71 (Witness here stood aside.)

The plaintiff having rested his case, the defendant, to maintain the issue on its part, introduced the following evidence:

J. L. HARTMAN, sworn on behalf of defendant, testified as follows:

By Mr. Carter:

Q. Mr. Hartman, you are in the employment of the C. & O., are you?
A. Yes, sir.
Q. Are you summoned by both sides in this case?
A. Yes, sir, by both sides—by the C. & O. and by Mr. Carnahan.
Q. You were on the freight train that was shifting and standing there?
A. Extra 596.
Q. Whereabouts on the train were you?
A. On the engine.
Q. You were then on the engine standing on the South Y, when

the train on which the plaintiff in this case was, passed by, were you?

A. Yes, sir.

Q. Will you tell whether or not you spoke to him, or spoke to the fireman on the train?

A. Yes, I saluted him; I holloed "Hello, Carney."

Q. As the engine passed you?

A. Yes, sir.

Q. Did he return your salute?

A. Yes sir; someone did.

Q. Had he passed you when he returned it?

A. He had passed a short distance.

Cross-examination.

By Mr. Allen:

Q. Did you say someone returned it?

A. Someone returned it; I suppose Mr. Carnahan.

Q. You don't know whether it was Mr. Carnahan?

A. I couldn't say for certain.

By the Court:

Q. What did you say?

72 A. "Hello! Carney."

By Mr. Carter:

Q. Is that his name, or yours?

A. His name. Carnahan's his name; I called him "Carney," you know.

Q. You said, "Hello! Carney"?

A. Yes, sir.

By Mr. Haw:

Q. What position was he in when you spoke to him?

A. I couldn't tell; I don't know.

Q. What part of him did you see?

A. I could not see him definitely; in those engines it is very dark.

Q. What did you see?

A. I could not see him distinctly; I couldn't say.

Q. What position was he occupying?

A. I couldn't tell.

Q. What part of him did you see?

A. I didn't say I saw any of him.

Q. Just tell whether you did see any of him?

A. I did not—I could not say for certain.

Q. You couldn't say for certain you saw the man, at all?

A. No, sir.

Q. You just said, "Hello! Carney"?

A. Yes, sir.

Q. And what did you hear?

A. I heard some one hello back.
Q. Whether he saw you or not, you don't know?
A. No, sir.
Q. And you don't know whether you saw him; in fact you are inclined to think you did not see him?
A. I am sure I didn't see him.

Redirect examination.

By Mr. Carter:

Q. The man you saw was on the engine on which Carnahan was hurt?
A. Yes, sir.
Q. He was on the side that the fireman would be on?
A. The side he is supposed to be on, yes, sir.
Q. And the man on that side replied to your salutation?
73 A. I supposed it was him; I could not swear to it.
Q. You called him Carney?
A. Yes, sir; and someone replied.
Q. And he replied?
A. Yes, sir.

Recross-examination.

By Mr. Haw:

Q. Do you take back what you said just now—that you didn't see him?
A. I don't take back anything; I say I didn't see him to know him; I saw some man.
Q. What part of the man did you see?
A. I didn't say what part; I just helloed; I knew he was on there: I had seen him in Richmond, when he left; and I helloed "Hello, Carney."
Q. You hadn't knocked him to pieces then, when you saw him?
A. I saw someone on the engine.
Q. What part of that man did you see?
A. I just saw him in the dark; I couldn't tell what part of him it was.
Q. Did you see his clothes, and skin?
A. I saw his clothes, I suppose.
Q. What part?
A. I suppose they were his overalls—but I was not taking a photograph of them.
Q. You say you saw them; what did you see?
A. If I saw a person in the dim distance, what would I see? I saw the figure of the person.
Q. What part of the figure did you see?
A. The whole figure, I suppose.
Q. The whole figure, from the feet up?
A. I don't suppose I saw the feet.
Q. What do you suppose you saw?
A. I saw someone on the engine, who I supposed to be Carnahan.

Q. What part of that man did you see?
A. I never have said that I saw all of him.
Q. Did you see his foot?
A. No. I saw his foot after he was hurt; I did not see his foot then.
Q. When he passed by and you said, "Hello! Carney," what part of Carney did you see?
74 A. I saw someone in the dim distance.
Q. What part of him?
A. Well, I saw a man standing up; I couldn't tell whether it was Carnahan or not.
Q. What part of the man did you see?
A. I saw his face.
Q. You saw his face?
A. Yes.
Q. Which way was he looking?
A. I couldn't tell which way he was looking; I don't know.
Q. Did you see his hands?
A. No.
Q. Didn't he have one hand up trying to reach the bell cord?
A. I couldn't see that plain; you must remember it was very dark that night, and he was at some distance.
Q. How far were you from the place where they came together?
A. What do you mean—whether——
Q. When you holloed "Hello! Carney," how far were you from the place where the two trains came together?
A. Ten car-lengths.
Q. How do you remember that so accurately, and don't know what part of the man you saw?
A. Well, I know the track much better than you do.

By the Court:

Q. Can you say where the figure you saw was on the engine? Was he in the cab, or out between the cab and the tender?
A. He was standing on the foot-board when I saw him.
Q. I don't know where the foot-board was.
A. Where you stand down to fire.

By Mr. Allen:

Q. Was he right in front of the boiler-head, where they put in coal?
A. He was in front of the fire part; he was bound to be, if he stood on the foot-board.
Q. So he was right in front of the boiler-head where they put coal in, when you saw him?
A. Yes, sir.
75 Q. And I suppose you saw him as the train swept by you, and that is why you could not tell whether that was him or not?
A. No, I couldn't tell what kind of a necktie he had on him, and everything like that.

Q. You could not say that he was not engaged firing his engine right at that minute, could you?
A. Ask me that again.
Q. I say you could not say now that he was not in the act of firing his engine right at that minute, could you?
A. No.
Q. Or doing something that was incident to firing—putting coal in?
A. No, I could not.

(Witness here stood aside.)

M. FLANNAGAN, duly sworn on behalf of Defendant, testified as follows:

By Mr. Leake:

Q. Mr. Flannagan, what is your business?
A. I am Division Master Mechanic of the C. & O., Eastern Division.
Q. You have been in the railroad service then quite awhile, I imagine, from your holding that position?
A. Yes, sir.
Q. Mr. Flannagan, do you know the character of the headlight that this engine—it was No. 199, was it not?
A. Yes, sir, 199.
Q. —which was on Engine 199, the engine that pulled train 97 the night that Mr. Carnahan was injured? Do you know the character of the headlight on that engine?
A. Yes, sir, it was a standard C. & O., 16 inch oil burning headlight.
Q. That light is not available now, is it?
A. No, sir; not that particular one; but we have others of exactly the same class and character.
Q. Do you know how far a headlight of that type, such as Engine 199 was equipped with, will throw a light on a dark night, so that objects upon the track are clearly discernible by one who is looking ahead?

76 Mr. Allen: Wait a minute. He is a Master Mechanic but that probably does not make him an expert on the question as to how far a headlight would throw a light on the track.
Mr. Leake: Not if he has made a test of it?
The Court: If he has made a test of it, yes.
Mr. Leake: That is exactly what he has done.
Mr. Walsh: He ought to be confined to answering as to a headlight burning in the manner in which that one was burninig that night.
The Court: The jury would not be bound by it, but it will throw light on the proposition.

Q. I will ask you if you made a test of a headlight of the identical design of the headlight with which this engine was equipped?
A. Yes, sir.

Q. What was the result of that test?

A. Well, the result of the test—on a clear night, with no moon—showed that a car or other object on the track could be distinctly seen a distance of three hundred feet or more; in fact the actual figures, measured at a distance of 313 feet—cars could be seen distinctly standing on the rails, in a direct line with the rays of light; while on the tracks adjoining, say from fifteen to twenty feet off to the right, which would be those on the curve, we could see them distinctly at 270 feet.

Q. Was that test made on a dark night?

A. On a dark night—clear though, and no moon.

Q. Mr. Flannagan, did you make a test as to how far an engine running at the rate of ten to twelve miles an hour could be stopped, with the application of such brakes as they are equipped with?

A. Yes, sir.

Q. Within what distance could it be stopped?

A. Well, we find that an engine alone could be stopped within a distance of thirty-five feet, running at from ten to twelve miles an hour.

Q. What effect, Mr. Flannagan, would the addition of cars have attached to the engine, upon its ability to stop within a given distance?

77 A. Well, I will say that cars of the type that were in this train—the train could have been stopped more quickly than the engine alone could have been stopped. The engine ordinarily brakes at about seventy-five per cent of its total weight, while cars of the Pullman weight never brake at less than ninety per cent of their total weight; therefore, with the Westinghouse brake, with which this was equipped, a train in this instance could have been stopped more quickly than the engine could, at the same speed. I would say, beyond a doubt, that we could figure, even without the aid of sand on the rail, to have stopped a train of this size within fifty feet, in every instance, at a speed of twelve miles an hour.

Cross-examination.

By Mr. Allen:

Q. When did you make the test of that light, that you speak of?

A. We made the test on the night of March 13th, at about 8 P. M.

Q. This year?

A. Yes, sir.

Q. For what purpose were you making those tests?

A. To get definite information in connection with the information I am giving now—to know exactly what I could say in connection with it, if asked that definite question.

Q. In other words, you were preparing for this case, at that time, were you?

A. Not exactly. We made headlight tests for general information on the road. This is not the first test we have made, of the headlight service, but it was verified by the tests we had made previously.

Q. Your company is doing away with the oil lamp, is it not, and adopting the electric light, for its headlights?

A. No, sir, it is not.

Q. Is it not a fact that you are now using a great many more electric headlights than you used to?

A. No, sir, we are not equipping any freight cars with electric lights, at all; but in the passenger service, their line service is already equipped with the electric; but the local and branch line service is not equipped with electric lights, and I think it likely they will not be.

78 Q. Is it not a fact that one lamp burning oil—a lamp of the same type burning oil, is liable to give less light than another, similar lamp burning oil?

A. It is entirely possible that they would vary, yes, sir.

Q. Depending on the wick conditions, and the quality of the oil?

A. Well, of course the quality of oil would come into play, but it is the same type of oil, or same class of oil used all the time on our road, so we would not have trouble of that kind; it would be the general condition of the lamp and reflector; but not of the oil.

Q. Do you test all the oil you buy?

A. We do not make a chemical analysis of it, no, sir.

Q. You just depend upon the oil companies to give you what you order?

A. Yes, sir.

Q. I notice recently they have been having some trouble along that line—for selling gasoline mixed with coal oil. It is true then that the light you used in making this experiment was of course in good condition, was it not?

A. It was a light right along in service—no special arrangement made about it; nothing was said to the shop people or crews about a test; we simply took the light as it was in service, without making any special provision, at all.

Q. You saw, though, that that light was in good condition before you made the test, did you not?

A. It was in good condition, but no examination was made until we went out in the yard to make the test.

Q. Didn't you look at it to see if it was in good condition, before you made the test?

A. I looked at it, and saw it was in good condition.

Q. In first class condition, was it not?

A. I won't say first class condition, but in average condition; we aim to keep them all in good condition.

Q. I understand that; but it is impossible to do that having them expressed around the country as you do. Is it not a fact that an oil lamp on an engine may start out in good condition, and before it goes very far it will be in very bad condition, from smoking, or some defective burning, combustion, or something of that sort?

A. I think that is barely possible; I think that is certainly an exception, rather than a rule. We feel that the oil light is less liable to failure than the electric light, because there are less complications.

79 Q. You feel that they are more certain to give some sort of a light, than the electric light?

A. Yes, sir; I think the percentage of failures, with the oil lamp, is below what you would expect of the electric equipment.

Q. That is, a total failure?

A. Yes.

Q. Where was that experiment made?

A. It was made on the tracks west of Richmond, within the yard limits there—but up on the track outside of the city lights.

Q. What hour of the night was it?

A. I previously stated that it was about 8 P. M.

Q. Do you know anything about where this light came from, that was used on that engine that night—199?

A. I can not say definitely from which manufacturer it came from, but we get lights made by different manufacturers, of a standard design, and it doesn't matter from which concern they come, they are exactly the same candle power, and exactly the same design and shape, so that would not come in play.

Q. My question had reference to the immediate use of the light before it started out with 97 that night?

A. I do not understand your question, sir.

Q. Do you know whether that lamp had been in use that night, or immediately before they started with it on 97?

A. Well, I could not say that I remember distinctly about that case, but I know that was a branch line passenger engine, and no changes, as I recollect, were made in the light. I could not take oath to that, but I am satisfied I would be safe when I say there was no change made on it, because a branch line passenger engine enters the terminal only on one trip, and it went out with that equipment that night going west.

Q. Where would it come in from the branch line?

A. It came from the Lexington Branch.

Q. The James River Branch?

A. Yes, sir.

Q. And it came around and took 97 out that night?

A. I don't know what time the equipment left, or how long that remained there at the terminal, but it was probably the same day.

Q. Why didn't you make the test with that lamp?

80 A. Because that lamp was not available to me.

Q. What had become of it?

A. I am unable to say what became of the lamp.

Q. Have you seen it since the collision?

A. I have never seen the oil burning portion of it, that I recollect.

Q. Since then?

A. I do not recall that I have. I never paid any attention to that feature, because it developed at the time that there was no defect in the light; there was no question raised about it, and we did not preserve any particular portion of that any more than other parts of the engine.

Q. There was no question raised about the headlight?

A. No, sir, there was not.

Q. Do you know why your company raises any question now?
A. I can not tell you that.
Q. What became of engine 199?
A. She has never been repaired; she is on the Richmond yards now, never has been overhauled since the accident.
Q. Is it not a fact that she is in the scrap pile there?
A. No, sir, she is not.
Q. She is standing on the side-tracks?
A. She is on the yard somewhere; I can not tell you exactly where she is; but she has not been overhauled.
Q. She is under your charge, is she not?
A. If she were overhauled she would be turned over to me for repairs.
Q. If it could be overhauled it would be turned over to you, but if it could not be overhauled it would not be turned over to your charge?
A. All engines turned over to the shop for repairs; but engines of this type have not been repaired; except those assigned to work. Another engine of this type was put in the place of this one, and that being a light engine it has not been overhauled yet,—like a good number of others of the same class.
Q. So it is at present not under your supervision?
A. I will say this, that it is under my supervision to the extent others that are awaiting overhauling, are.
Q. I understood you to say that none of those were under your supervision unless they were put in for repairs again?
A. If you have that idea, I did not mean that. Of course
81 all power in the territory comes under the supervision of the Master Mechanic, so far as maintenance and things of that kind; but power of this kind is not being overhauled, as I stated, except when needed for certain service.
Q. Then is that under your supervision, or under some other department of the road?
A. It would come under the Motive Power Department—directly under the Superintendent of Motive Power, and by his instructions when power of that kind is to be taken through it will have attention in the way of repairs like the rest.
Q. You are Division Master Mechanic; would it not come under your control?
A. It would not come under my power to take it into the shops, as I said just now, with the present instructions; that is, we have instructions not to overhaul power of that type, except when it is needed for certain service; and an engine from another point was put in the place of this one, and this one has not been overhauled yet.
Q. Although it has been more than a year since this collision, the Company has not thought it necessary to fix that for its use?
A. Not as yet; and we have others of the same type that have been waiting the same time, or longer, for repairs, that have not even been damaged.

By Mr. Haw:

Q. Where did you say this experiment with the light was made?
A. On the C. & O. tracks west of Richmond; it was in the yard limits, but out beyond the city lights.
Q. Ain't there street lamps and other lights near that?
A. No, sir.
Q. Is it on the main track or side line?
A. On the long siding away up west of the American Locomotive Works.
Q. West of the Locomotive Works?
A. Yes, sir.
Q. How near that?
A. Why, I would say a quarter of a mile west of there, right around the curve.
Q. Up there near Highland Park?
82 A. Not that far. You know the ravine as you go up the hill from the Locomotive Works—up towards the hill which is near Highland Park.
Q. What time did the moon rise that night?
A. I couldn't tell you.
Q. Did it rise about 8 o'clock?
A. There was no moon when we made the test.
Q. You said it was 8 o'clock, did you not?
A. It was 8 o'clock, and there was no moon, either.
Q. There are some beautiful nights in March, sometimes?
A. Yes, sir, but there was no moon that night.

By Mr. Allen:

Q. What kind of an engine did you make the stopping test with?
A. The stopping test was made with a six-wheel switcher.
Q. Is that a similar type of engine to this one we have been talking about—199?
A. It is not a similar type of engine, but the percentage of weight brake is the same as it is on the type we have been talking about, or a little bit—practically the same.
Q. Was that a yard engine you were testing?
A. It was a yard engine, yes, sir.
Q. A different type of engine?
A. A different type of engine.

By Mr. Haw:

Q. Were the wheels the same height as the others?
A. Yes, sir, the same height.

By Mr. Allen:

Q. Did you make that test on March 13th, 1914, too?
A. Yes, sir.
Q. Was that made with reference to this case?
A. We just made it as a matter of information, thinking it might be needed in this case. Mr. Leake and Mr. Dunn, both, wanted to

know just exactly what distance it would take, and the demonstration was made more for their personal benefit than thinking it would be needed here.

Q. It was for Mr. Leake and Mr. Dunn—for their amusement, I suppose,—a few days before this case was going to be tried?

83 A. I don't think it was any more than reasonable that they should want to know it.

Mr. Allen: Well, that is perhaps true.

(Witness here stood aside.)

J. W. BEASLEY, duly sworn on behalf of Defendant, testified as follows:

By Mr. Carter:

Q. Mr. Beasley, where were you born and raised?

A. I was born in Spotsylvania.

Q. How long had you been in the employment of the C. & O., at Doswell, when this accident occurred by which this gentleman here lost his leg?

A. Twelve years.

Q. What was your duty at the office that night?

A. Telegraph operator.

Q. You were in the tower?

A. Yes, sir.

Q. Did you know that night that there was standing on the main track of the Chesapeake & Ohio some detached freight cars—coal cars, I think—when the train was ordered forward?

A. No, sir.

Q. Captain Shisler says that he had told you these cars were there, and that you must turn in this train on which this gentleman was hurt, on the branch line, on the north switch, and send it through that way.

A. No, sir.

Q. Is that a mistake?

A. That is a mistake; I never heard it; if he told me I never heard it.

Q. Now you were there in the tower, and you turned on a white light to let it go through?

A. Yes, sir.

Q. Where did you understand those cars were—if there were any cars up there on the track?

A. I didn't know there were any cars up there, at all.

Q. Well, what did Captain Shisler say to you, or what did

84 *to go there* you say to him, that night just before this accident, do you remember?

A. My instructions were, when I come to work, from the second trick operator, before I ever seen Captain Shisler, that Extra 596 was at the west and shifting, and that I was to hold No. 97, or any westbound train, at the home block signal, until I heard from Captain Shisler—that he didn't know where he would have his train. Soon

after that Captain Shisler came in the office and asked me about turning his engine; he wanted to head it back east, and I told him that the switches were working very bad, that it was hanging, and that was a very hard move to make when the switches were working in the condition they were, although I would try. So I started to turn his engine. In the meantime No. 97 pulled up to the station—the home block signal—and stopped; I had the switches all against him; the de-rail was open, and the signal was setting red. It had been standing there a minute or so, and I called Captain Shisler's attention to it, told him I was holding 97 down there, and his reply was, "All right"; and in a few minutes after that I called his attention to it again, said, "Captain, there is 97 down here," and I didn't hear him make me any reply; he was there at the table; he leaned over against the table figuring out his tonnage, or working in some way or another on some bills, and when he got ready to go he picked up his lamp, and said, "All right, you can let 97 over," and I walked with him on to the door, and I said, "All right, let 97 on over?" He said, "Yes, let 97 on by; I am going to see if all the switches are lined up; I don't want to run through any switch." So I immediately changed everything from the R. F. & P., and set them up to the C. & O., and gave 97 the white signal to proceed.

Q. How about that colored man who was in the office that night, that was turning switches?

A. This colored man, he helped me pull a lever—No. 25 lever—No. 26 lever; No. 25 is the switch, No. 26 is the locker to it; this locker was hanging, and we had to throw down 25 and pull it backwards and forwards three or four times—jerk it—before we could get it to close, and I had a sore thumb at the time, and I called on this negro to help me handle that switch. This negro doesn't know one switch from another.

Q. Whatever he did was helping you?

A. Helping me.

85 Q. Helping you pull the switch?

A. Yes; I had my hands on the switch with him.

Cross-examination.

By Mr. Allen:

Q. The C. & O. Company discharged you for letting 97 through that night, didn't it?

A. Yes, sir.

Q. Do you remember Mr. Blue being in there too, when Captain Shisler was in there?

A. Yes, sir; Mr. Blue—I remember him coming up in there for about two minutes.

Q. Now Mr. Blue and Captain Shisler have both testified that he told you to let 97 in on the passing siding, and that he would go on west and throw that switch. I say both of them have testified to that?

A. Yes, sir.

Q. Do you still say they are mistaken about it?
A. I certainly do.
Q. You stated awhile ago that you did not hear that?
A. I did not hear it, no, sir.
Q. They might have said it, and you might not have heard it?
A. If they said it I didn't hear it, no, sir.

By Mr. Haw:

Q. When you speak of changing the lights—do you do anything more than change the lights? Don't you throw the switches?
A. Yes, sir, throw the switches.
Q. So you are the man who opens the switches that were closed before, and threw the light, showing that it could get through clear?
A. Well, these switches were open when 97 pulled up to the station. These de-rails were open right beyond the signals, and I had to close those de-rails before I could pull the signal white.
Q. You did all that, so they would have a clear run?
A. Yes, sir.

(The witness here stood aside.)

86 The Defendant rests.
The testimony ends.

And this being all the evidence in the cause, the jury (after having been instructed by the court, the instructions to the jury both oral and written being set out in full in Bill of Exceptions No. 3, filed herewith) retired to their room to consider of their verdict and after a time returned into Court with the following verdict, to-wit:

"We, the jury find for the plaintiff and fix the damages at $25,000.00."

J. S. PRIDDY, *Foreman.*

Thereupon the defendant by counsel, moved the Court to set aside the verdict of the jury and award it a new trial upon the following grounds: (1) The verdict was contrary to the law and the evidence. (2) The misdirection of the jury by the court in its instructions. (3) The damages were excessive; and (4) The jury was not summoned, selected, formed and constituted in accordance with Article VII of the amendments of the Constitution of the United States and the laws passed in pursuance thereof. But the court overruled said motion and declined to set aside the said verdict and award the defendant a new trial; to which ruling of the court the defendant, by counsel, excepted, and tenders this its Bill of Exceptions No. 2, and prays that it may be signed, sealed and made a part of the record in this case and the same is done accordingly on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

Bill of Exceptions No. 3.

Be it remembered that on the trial of this cause and after the jury had been duly sworn to try the issue joined and after all the evidence

had been introduced both for the plaintiff and for the defendant, which said evidence is set out in full in defendant's bill of exceptions No. 2, filed herewith, the plaintiff, by counsel moved the Court to give the following instructions to the jury, numbered re-
87 spectively I, II, III, and IV; which are in the words and figures following, to-wit:

I.

The Court instructs the jury that the plaintiff was at the time of the injury complained of, engaged in interstate commerce, and his rights and the liability of the defendant are governed by the Employers' Liability Act, so called, and they shall disregard the third and fourth counts of the plaintiff's declaration.

II.

The Court instructs the jury that if they believe from the preponderance of the evidence that the defendant's employees were charged with duties as alleged in the plaintiff's declaration and failed to perform such duties and that such failure was the proximate cause of the plaintiff's injury in whole or in part then the defendant is liable to the plaintiff.

III.

The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, assessing such damages, not however in excess of $35,000.00 as to them may seem just and fair.

IV.

The Court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case.

To the giving of the said instructions numbered respectively, II, and III, any or either of them, the defendant by counsel objected, but the court overruled said objections and gave all the said instructions to the jury, to which action of the court in giving instructions numbered respectively II and III, any or either of them, over the objections of the defendant, the defendant by counsel excepted.

88 And the said defendant by counsel, thereupon moved the court to give to the jury the following instructions, marked respectively (*a*), (*b*), (*c*) and (*d*), which are in the words and figures following, to-wit:

(*a*)

The Court instructs the jury that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injury he received was the direct and proximate result of the negligence of the defendant.

(*b*)

Should the jury believe from the preponderance of the evidence that the plaintiff was negligent and that such negligence contributed to the accident which caused the plaintiff's injury, even if they find that the defendant company is liable, they should reduce the amount of damages to which they think his injury entitles him in the proportion which his negligence may bear to the combined negligence of himself and the defendant.

(*c*)

The court instructs the jury that in estimating the damages to which the plaintiff may be entitled, if they think he is entitled to any, they cannot consider the chance of his increased earnings by reason of promotion.

(*d*)

The jury should not take into consideration the prospects of increased earnings by the plaintiff, if he had not been hurt, hereafter to be made by him.

The court thereupon gave the instructions marked respectively (*a*) and (*b*) as asked for by the defendant, but refused to give the instructions marked respectively, (*c*) and (*d*) asked for by the defendant, any or either of them, but in the course of argument of counsel for the plaintiff the Judge cautioned counsel when discussing the plaintiff's damages that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earnings capacity of the plaintiff.

89 To the action of the court in declining to give instructions marked (*c*) and (*d*) respectively, asked for by the defendant, the defendant, by counsel, excepted.

And the instructions set forth herein are all the instructions asked for by either party and the instructions set forth above as having been given by the Court, are all the instructions, either oral or written, given by the court to the jury in this cause.

The defendant by counsel thereupon tenders this its bill of exceptions No. 3, and prays that it may be signed, sealed and made a part of the record in this cause, and the same is accordingly done on this 16th day of April, 1914, and within the time prescribed by law.

R. H. L. CHICHESTER. [SEAL.]

STATE OF VIRGINIA,
County of Hanover, To wit:

I, C. W. Taylor, Clerk of the Circuit Court of Hanover County, in the State of Virginia, do hereby certify that the foregoing is a true transcript of so much of the record and judicial proceedings of said Court in an action of Trespass on the Case, lately pending therein, as I have been directed to copy. And I further certify that the said defendants have filed a written notice to the plaintiff of its intention to apply for such transcript of said record, which notice was duly accepted by Allen & Walsh, Attorneys for the Plaintiff.

Given under my hand this 24th day of April, 1914.

C. W. TAYLOR, *Clerk.*

Fee for copy of record $20.00.

In the Supreme Court of Appeals of Virginia.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
v.
ASA P. CARNAHAN, Defendant in Error.

It is hereby stipulated by counsel for Plaintiff in Error, and by Counsel for Defendant in Error, that the error in the tran-
90 script of the record, filed with the petition for a writ of error in this cause, in that said transcript of the record omitted the ground of demurrer insisted upon at the hearing of this cause, may be corrected by the insertion of said ground as attached to this stipulation. And it is further stipulated that said ground of demurrer, as attached to this stipulation, shall be treated in all respects as if brought to this court on writ of certiorari, or other proceedings for the correction of the record in the respect aforesaid.

Dated June 18, 1914.

D. H. & WALTER LEAKE,
Counsel for Chesapeake & Ohio Railway Company.
ALLEN & WALSH,
Counsel for Asa P. Carnahan.

VIRGINIA:

In the Circuit Court of Hanover County.

ASA P. CARNAHAN
v.
THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Demurrer to Declaration and Ground Thereof.

The said defendant demurs to the declaration in this case and each count thereof, and for cause of demurrer says:

That the same is not sufficient in law.

And the said defendant sets forth the following as its Ground of Demurrer:

1. The said declaration combines an alleged cause of action under the laws of the State of Virginia with an alleged cause of action under the Employers' Liability Act of the Congress of the United States, approved April 22nd, 1908.

A Copy—Teste:

H. STEWART JONES, *C. C.*

91 & 92 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Wednesday, the 20th Day of January, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
against
ASA P. CARNAHAN, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Hanover County on the 25th Day of March, 1914.

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises time is taken to consider thereof.

A copy.

Teste:

H. STEWART JONES, *C. C.*

93 CHESAPEAKE AND OHIO RAILWAY COMPANY
v.
ASA P. CARNAHAN.

Opinion by Judge R. H. Cardwell.

RICHMOND, VA., November 11, 1915.

Circuit Court of Hanover County.

This action was brought by the defendant in error, Asa P. Carnahan, against the plaintiff in error, The Chesapeake and Ohio Railway Company, to recover damages for personal injuries imputed to the negligence of the defendant. At the trial there was a verdict and judgment for the plaintiff for $25,000 damages, and to that judgment this writ of error was awarded.

The plaintiff was, and had been for some years prior to his injury, an employee of the defendant as fireman on both freight and passenger trains, and on the date of his injury, March 7, 1913, was in the line of his duty on one of defendant's trains which left Richmond, Va., at 12:40 a. m., west-bound, the train, besides the engine and

tender, consisting of seven empty tourist sleepers, being moved "dead-head" (i. e., without passengers or freight) from Richmond, Va., and destined to points without this State. Upon the arrival of the train at Doswell about two o'clock a. m., and as it approached
94 that station, before crossing the tracks of the R. F. & P. R. R. Co. at that point, it stopped on signal given by telegraph operator J. W. Beasley in the tower of Doswell, the signal being given on account of there being then a series or "cut" of fifteen or sixteen empty cars, coupled together, standing on the main track a short distance west of Doswell, just west of a county road crossing, which were being collected into a special train in charge of Conductor J. R. Shisler to be brought east to Richmond. This "cut" of empty cars had just been placed by Conductor Shisler on the main track, with the caboose on the west end of them, and no lights of any sort on the east end—that is, facing the direction from which the train that plaintiff was firing approached; nor was there a flagman placed there to protect said "cut" of cars or to give warning of an approaching train, the engine that had placed them on the main track being then on a side track nearer to the station—Doswell.

After delaying plaintiff's train, west-bound, some six or seven minutes at the point where it had been stopped on signal, a signal was given it by Operator Beasley, from the tower or telegraph office, to proceed, meaning that the main track was clear, and the train proceeding ran into the east end of said "cut" of cars that had been left standing on the main track, as stated.

95 In the collision, the plaintiff was caught, from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for these injuries and his consequent sufferings that he sues to recover damages.

The declaration contains four counts. The first two counts charge that plaintiff and defendant were engaged in interstate commerce, thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of Operator Beasley, and the other upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other two counts were based upon the same grounds of negligence, save that they omitted any allegation as to the parties being engaged in interstate commerce, thus alleging a cause of action under the law of this State. There was a demurrer to the declaration upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law, which demurrer was overruled, and this ruling is made the basis of defendant's first assignment of error, but in the oral argument of the case before this court the assignment was waived.

The case was tried by a jury of seven, in accordance with the provisions of section 3166 of the Code of 1904. It was regularly summoned under the State laws and consisted of nine veniremen, which,

after the plaintiff and defendant had each stricken off one venireman, left the jury of seven who tried the case. Before the jury,
96 however, had been examined on their voir dire, and before any members of the panel had been stricken off by either party, the defendant challenged the array of jurors and moved the court to quash the venire facias, upon the grounds that the jury was not summoned, selected, formed and constituted as required by Art. 7 of the Amendments to the Constitution of the United States, which is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The motion to quash the venire was overruled and this ruling is made the basis of the defendant's second assignment of error here, the contention being that the rights asserted in this suit are Federal rights, created by the Congress of the United States, and can only be tried by the common law jury of twelve, required by the seventh Amendment to the Constitution, supra, since the jury referred to in this amendment is the common law jury of twelve.

This contention is without merit. Section 6 of the Employers' Liability Act, as amended by the act of April 10, 1910, expressly provides that the Federal courts shall have concurrent jurisdiction
97 with the State courts of cases arising under the act, and that no case brought in a State court shall be removed to a Federal court. How else is a State court to exercise its jurisdiction in such a case except according to the procedure provided for in its own statutes? The statutes of this State make no provision for a trial in civil cases by a jury of twelve, except for some special reason when a special jury may be summoned under section 3158 of the Code, and the allowance or refusal of a special jury is a matter resting in the sound discretion of the court. A. & D. R. Co. v. Peake, 87 Va. 130, 12 S. E. 348.

Upon reason and authority it is not essential to the enforcement of a right created by a Federal law that provisions of the Federal Constitution regarding the administration of the federal law be followed. The enforcement of a Federal right, as it seems to us from the authorities, does not differ from the enforcement of rights created by other sovereignties than the United States, in that it draws with it the necessity of enforcement in the manner prescribed by the Federal Constitution for the administration of justice.

It is well said by the learned counsel for the plaintiff in this case: "Rights created by the Congress of the United States become
98 a subject of litigation between parties and are enforced as a basis of liability in the same manner as are other rights subsisting between litigants. The United States is a sovereign possessing all the attributes of sovereignty, though exercising its sovereignty over a limited subject matter. One of the attributes of sovereignty is the authority to create rights and obligations between persons amenable to its jurisdiction. Those rights once created in no way differ from

rights created by any other sovereignty. It is true that owing to the peculiar relation between the National and State governments the national and federal government may exclude the State courts from the exercise of jurisdiction over Federal rights, but in the absence of such restriction, Federal rights are enforcible in any court having jurisdiction of the parties."

The relation of the State courts to rights created by the Congress of the United States is very clearly explained in the Federalist, No. 82, page 608, as follows: "I mean not, therefore, to contend that the United States in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the Federal courts, solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, fur-
99 ther than may relate to an appeal; and I am of opinion that in every case in which they were not expressly excluded by the future actions of the national legislature, they will, of course, take cognizance of the cause to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, although the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this we consider the state government and the national government as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited."

In the Second Employers' Liability Cases—Mondou v. N. Y. N. H. & H. Ry. Co.—223 U. S. 1, 56 L. Ed. 327, the court in reviewing the action of the State court of Connecticut in refusing to enforce the act because not in harmony with the policy of that State, said:
100 "Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State courts, or to control or affect their modes of procedure, not only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the superior courts of the State are courts of general jurisdiction, are empowered to take

cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recov-
101 ery, as where the causal negligence was that of a fellow servant. * * * We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

The court in Claflin v. Housman, 93 U. S. (3 Otto) 130, 23 L. Ed. 833, 838, defines the relation of the State courts to Federal laws as follows: "It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506 (62 U. S. xvi, 169): and hence the State courts have no power to revise the action of the Federal courts, nor the Federal, the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

In that case the opinion by Mr. Justice Bradley reviews
102 and commends the views presented by Alexander Hamilton in No. 82 of the Federalist, supra, and this is said: "These views seem to have been shared by the first Congress in drawing up the Judiciary Act of September 24, 1789, 1 Stat. at L. 73; for, in distributing among the various courts created by that act, there is a constant exercise of the authority to include or exclude the State courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases."

As we read the Constitution of the United States, in the light of judicial interpretations thereof, as originally adopted, there is nothing which by any possibility could be construed as an inhibition on the State courts, or as prescribing the procedure to be adopted in enforcing Federal rights. The 7th Amendment was proposed to the legislatures of the several States by an act of Congress passed at the first Congress, September 25, 1789, which was the day following the passage of the Judiciary Act, creating Federal tribunals inferior to the Supreme Court, and this act of September 24, 1789, first
103 created courts having jurisdiction for the enforcement of Federal laws. Until then they were enforcible only in the State courts. Thereupon, on the next day, the act subsequently embodied in the first ten amendments was passed, and we agree with the contention of counsel for the plaintiff in this case that this is a significant fact in determining the application of the 7th Amendment to

State courts, whether they are taking cognizance of Federal or State laws, for it necessarily requires the inference that it was made necessary by the creation of Federal trial courts, and applies to them only. This view is clearly borne out by the following decided cases: Barron v. Baltimore, 7 Pet. 248, 8 L. Ed. 672; Edwards v. Elliott, 21 Wall. 557, 22 L. Ed. —; Walker v. Savinet, 92 U. S. (2 Otto) 90, 23 L. Ed. 678; Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119; Maxwell v. Dow, 175 U. S. 581, 44 L. Ed. 597.

We deem it necessary to quote from only two of these cases.

In Walker v. Savinet, supra, the court speaking of an act of the State of Louisiana, permitting a judge to enter a judgment without a verdict in case a jury failed to agree, said: "This (7th Amendment), as has been many times decided, relates only to trials in the courts of the United States. Edwards v. Elliott, 21 Wall. 557. The
104 States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the 14th Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. Murry v. Hoboken etc. Co., 18 How. 280, 15 L. Ed. 276. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States, Art. VI, Constitution. Here the State court has decided that the proceedings below were in accordance with the law of the State, and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

105 In Brown v. New Jersey, supra, there was called in question the constitutionality of the law of New Jersey providing for a "struck" jury in felony cases, and the opinion by Mr. Justice Brewer, citing many authorities, said: "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. * * * The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations hereinbefore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

These authorities, we think, fully answer the further contention

of the learned counsel for the defendant in this case, that the 14th Amendment to the Constitution of the United States has operated to enlarge the scope of the 7th Amendment, thereby rendering the 7th Amendment a privilege under the 14th Amendment.

106 It is inconceivable that the Supreme Court in the Second Employers' Liability Cases, supra, in holding that the right of the State courts of general jurisdiction to enforce a right under this law created an implication of duty to enforce it, intended that this ruling should be restricted to courts of States providing a jury of twelve. Federal rights are recognized and enforced in the State courts, as are any other rights which are the basis of a litigation, whether arising out of State or foreign law. The Constitution of the United States contains no prohibition to the enforcement of those rights in the State courts, in accordance with their established mode of procedure, and the 7th Amendment is a limitation on the administration of law in the Federal courts, not a limitation on the conduct of litigation, on whatever rights based, in the State courts.

The next assignment of error calls in question the correctness of the following instruction given for the plaintiff over the objection of the defendant: "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sus-

107 tained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not, however, in excess of $35,000.00, as to them may seem just and fair."

The objection to this instruction is first directed to the use of the words therein, "its effect upon his future," the contention of the defendant bein*f*, in effect, that this language was entirely too broad and allowed the jury to take into consideration things which might be in their nature essentially speculative and remote, and for which there could be no recovery in damages; that is, the jury might have considered the possibility of the plaintiff's promotion and speculative profits from collateral undertakings upon which he might have embarked but for the injury, both of which have been condemned as improper elements of damage in such cases; and, second, the contention is that the instruction directs the attention of the jury to the sum of $35,000.00 without qualifying it with the statement that the sum was mentioned merely because it was the maximum amount claimed in the declaration.

To sustain the first objection to the instruction, we would have to reach the conclusion that the jury could have not only taken into consideration matters which were not in evidence, but matters

108 which they were expressly instructed not to consider. The record shows that the trial court was careful to exclude, upon defendant's objection, all evidence of possibility or probability of plaintiff's promotion, and of his possible or probable increased earnings; and it also appears in the record that the presiding judge "cautioned counsel when discussing the plaintiff's damage that there was no evidence in the record of the plaintiff's prospects of promo-

tion, and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earning capacity of the plaintiff."

It is true that this instruction was not in writing, but as there was no evidence in the record of matters remote or speculative, no evidence of prospects of promotion or increased earnings, however broad the language of the instruction under consideration, this court cannot assume that the jury disregarded the instructions of the trial court and rested their verdict upon matters remote and speculative, and not upon a consideration of the evidence in the case.

In R. & D. Ry. Co. v. Elliott, 149 U. S. 267, 37 L. Ed. 728, cited for the defendant in this case, it was said, that the particular losses the plaintiff sustained, or his possible promotion, could not
109 be considered, but what the future holds out for such a one, in general, was, of course, to be considered. See also, Wash. & Georgetown Ry. Co. v. Harmon's Admr., 147 U. S. 571, 37 L. Ed. 284, where the court held that an instruction permitting an award of damages for future effects of the plaintiff's injury, such as suffering of mind and body, personal inconvenience, and the loss of time he would suffer in the future, was not objectionable.

This court in Richmond & Danville R. Co. v. Norment, 84 Va. 167, approved an instruction which told the jury they should take into consideration "proper compensation for his (plaintiff's) being deprived by the said injuries from following such calling or business as he could have followed but for said injuries," the opinion of the court saying that the instruction was plainly proper and upheld by reason and authority.

Likewise the court, in Ches. & O. Ry. Co. v. Hoffman, 109 Va. 44, 2 Va. App. 766, in an opinion by Keith, P., approved an instruction, "that the amount of damages should compensate the plaintiff for the loss of money which he would probably earn had not the injuries occurred:" provided, of course, that the injuries received were the result of the negligence of the defendant company.
110 The instructions here complained of required the jury to take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effects upon his future. We do not think that the instruction is susceptible of the construction contended for, that it permitted the jury to take into consideration "possible future physical effects from the injury such as future suffering which in the absence of evidence as to the probability of such future suffering was improper." It would be a constrained construction of the language of the instruction, "its effects upon his future," to hold that it refers to future suffering, and that damages not the proximate result of plaintiff's injuries could have been included under the instruction. Not only so, the instruction enumerated accurately the elements of damages that the jury were to take into consideration, and at the instance of the defendant the court instructed them "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that

the injuries he sustained were the direct and proximate result of the negligence of the defendant."

In Norfolk Southern R. Co. v. Tomlinson, 116 Va. 153, 9
111 Va. App. 93, a case of a similar character to this, the court considered an instruction relating to the measure of damages which told the jury that in assessing damages they might take into consideration "such damages as will naturally, reasonably and probably result to him (the plaintiff) in the future as consequences of his injuries," without confining them to the evidence before them, and in the opinion by Buchanan, J., it was said: "It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them; but when the instruction as a whole is considered, we do not think that the jury could have thought they had the right to fix the future damages by mere conjecture instead of by the evidence before them."

So, in the case here, the instruction under consideration, when considered as a whole, especially when considered along with all the other instructions given in the case, the jury could not have, as it seems to us, thought they had the right to fix the future damages of the plaintiff by mere conjecture instead of by the evidence before them. See also Richmond F. & P. Co. v. Robinson, 100 Va. 394; Norfolk Ry. Co. v. Spratley, 103 Va. 379; Daingerfield v. Thompson, 33 Gratt. (74 Va.) 136.

112 With respect to the other objection to the instruction, viz: that it mentions the sum of $35,000.00 whereby the jury were misled, we deem it only necessary to say that it is not to be presumed from the amount of damages assessed to the plaintiff that the jury were misled by the mere mention of the sum claimed as damages in his declaration, since the court had defined the elements entering into the ascertainment of damages and expressly told the jury that such damages as they allowed should "seem to them just and fair." The instruction conforms to the suggestion made by this court with respect to an instruction complained of in Newport News Pub. Co. v. Beaumeister, 104 Va. 744, where the jury were told, "but damages may not exceed $10,000.00 the amount claimed in the declaration," omitting the limitation that the damages assessed by the jury should be such as they deemed just and fair.

There was no error in refusing defendant's instructions "C" and "D," telling the jury that they should not take into consideration "chances of increased earnings by reason of promotion" and "prospects of increased earnings if he had not been hurt." We find no evidence in the record that would have justified the giving of those instructions, and where such is the case it is too well settled to require citation of authority that if there is no evidence on the
113 subject matter of an instruction it should not be given; nor was there given an instruction for the plaintiff broad enough to permit the jury to consider these elements of damage, as counsel for defendant contends. Not only so, but the court, during the argument of the case for the plaintiff, cautioned counsel that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into

consideration any probable promotion which might have come to the plaintiff or any probable increase in the earning capacity of the plaintiff. In these circumstances the defendant could not possibly have been prejudiced by the refusal of its instructions "C" and "D."

The remaining assignment of error is to the refusal of the court to set aside the verdict and award the defendant a new trial, because contrary to the law and the evidence, and because of excessive damages assessed to the plaintiff.

We have already seen that there was no error in the rulings of the trial court in instructing the jury as to the law of the case, and the evidence to which we have adverted very clearly shows, as we view it, that the jury's finding could not have been other than in favor of the plaintiff, and that the record is free from any vital
114 error affecting his right to recover. There is nothing whatever in the record indicating that the jury, in ascertaining the damages, acted under the impulse of an improper motive, gross error, or misconception of the subject. The damages assessed to the plaintiff amount to a large sum, it is true, and if we could usurp the functions of the jury, perhaps we might say that the amount should have been less; but this we have no right to do, nor can we say, upon the evidence before us, that the verdict is plainly excessive. The injuries sustained by the plaintiff were very severe, and the circumstances connected with the accident and his attendant sufferings were in the highest degree distressing; or, as he, after describing his situation as being caught from his knee down—jammed against the boiler-head for fifty minutes and his leg roasting—on being asked as to his suffering, said, "there is no way to get at that." Amputation of his leg above the knee, leaving a stump of about eight or ten inches, followed. To the time of the trial, one year after the injury, the wound had not entirely healed. He had attempted to use an artificial limb but found that impossible, and not only was he thus crippled, but his nervous system was affected so that at times he still suffered pain and could not
115 rest, all of which facts were in a quiet way related by the plaintiff to the jury, the stump of his leg exposed to them that the unhealed wound might be observed by the jurymen.

The plaintiff was at the time of his injury thirty-two years old, was in the best of health, a man of unusual physique, who could stand the severest sort of labor and perform the arduous duties of a fireman on an engine as well as and above the average man of his age. He had been in the employ of the defendant as a fireman six and one-half years, both in freight and passenger service, earning at the time of his injury about $100 per month, and after the injury and up to the trial of this case he had been unable to earn anything or do anything, as he had no other profession or trade than that he was pursuing when injured.

In view of these facts, this court does not consider that it would be justified in disturbing the verdict of the jury on the ground that the damages assessed to the plaintiff are excessive. See, Southern Ry. Co. v. Smith, 107 Va. 553, 1 Va. App. 556, and authorities

cited; Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 6 Va. App. 647; N. Ry. & L. Co. v. Spratley, 103 Va. 379; C. & O. Ry. Co. v. Swartz, 115 Va. 723, 8 Va. App. 393, 685.

116 Upon the whole case, we are of opinion that there is no error in the judgment of the circuit court, and, therefore, it is affirmed.

Affirmed.

A Copy.
Teste:
H. STEWART JONES, *C. C.*

117 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 11th Day of November, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
against
ASA P. CARNAHAN, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Hanover County on the 25th Day of March, 1914.

This day came again the parties, by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the same be affirmed and that the plaintiff in error pay to the defendant in error damages according to law, and also his costs by him expended about his defence herein.

Which is ordered to be certified to the said circuit court.

A copy.
Teste:
H. STEWART JONES, *C. C.*

118 Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the original- on file and of record in my said office, and that said originals, together, constitute the record of the proceedings of said court in this case.

Witness my hand and the seal of the said Court, this the 26 day of November, 1915.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond, Va.

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 26 day of November, 1915.

JAMES KEITH, [SEAL.]
President.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said Court, this the 26 day of November, 1915.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Va.

119 Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a Corporation,
vs.
ASA P. CARNAHAN.

Assignment of Errors.

Comes now the said The Chesapeake and Ohio Railway Company, a corporation, (being the plaintiff in Error in the petition, herewith filed, for a writ of error from the Supreme Court of the United States) and makes and files this, its assignment of errors, and says that in the record, proceedings, decision and final judgment of the Supreme Court of Appeals of the State of Virginia, in the above-entitled case, there are manifest errors, in this towit:

The Supreme Court of Appeals of Virginia erred in affirming (and not reversing) the final judgment theretofore entered in this case by the Circuit Court of the County of Hanover, State of Virginia.

This action was instituted in the Circuit Court of the County of Hanover by Asa P. Carnahan against The Chesapeake and Ohio Railway Company, under the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act," and the trial of said action at law was had before a jury of seven men, selected and chosen under the laws of the State of Virginia, over the objection, seasonably made, of The Chesapeake and Ohio Railway Company. There was a verdict by the jury in favor of the plaintiff for $25,000.00 damages and final judgment rendered for said sum, which judg-

ment was affirmed, on a writ of error, by the Supreme Court of Appeals of Virginia.

The validity of the trial of the case by the jury, selected and chosen as aforesaid was denied and drawn in question, on
120 the ground that the said jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof, and there were objections made as to certain instructions given and refused by the Circuit Court of the County of Hanover, and a motion in arrest of judgment, and a motion to set aside the verdict of the jury and there was thereby drawn in question the construction of the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act" and certain other Acts of Congress.

The said errors are more particularly set forth as follows:

First. The Supreme Court of Appeals of Virginia erred in holding and deciding that the trial of this case was properly had before a jury of seven men, selected and chosen under the laws of the State of Virginia, and that the said The Chesapeake and Ohio Railway Company was not entitled to the trial of said action at law by a jury of twelve men, and in affirming (and not reversing) the ruling of the Circuit Court of the County of Hanover, in this regard.

The said The Chesapeake and Ohio Railway Company seasonably set up and claimed the right to have the case tried by and before a jury of twelve men, under and by virtue of the Constitution of the United States and the laws passed in pursuance thereof, particularly the 7th Amendment to the Constitution of the United States, and the decision of the Supreme Court of Appeals of Virginia thus deprives the said The Chesapeake and Ohio Railway Company of rights, privileges and immunities, claimed under the Constitution of the United States.

Second. The Supreme Court of Appeals of Virginia erred in holding and deciding that the instruction designated as instruction "III," given to the jury by the Judge of the Circuit Court of the
121 County of Hanover, over the objection of the said The Chesapeake and Ohio Railway Company was proper and in affirming (and not reversing) the ruling of the said Circuit Court of the County of Hanover in this regard.

The said instruction was as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

This instruction is objectionable on the following grounds: (*a*) it allows a recovery in damages not only for the damages proximately resulting from the injury but also for "its effects upon his future," which involves a consideration of consequences which might

be essentially speculative and remote and for which there could be no recovery in damages and (*b*) it tells the jury the damages are not to be "in excess of $35,000.00, as to them may seem just and fair," thus pointing out and calling the attention of the jury to a certain sum which they might find as damages and giving judicial approval to that amount, and allows the jury to assess such damages, not exceeding that amount as to them might seem just and fair, without stating that the damages should be only such as were proven by the evidence.

Under the Act of Congress of April 22nd, 1908, known as the "Employers' Liability Act," a carrier is made "liable in damages" to a person suffering injury under certain conditions therein set forth, for such injuries.

The necessary implication from the language of the act is that the damages for which a defendant is liable are such as appear by the evidence to have proximately resulted from such injuries
122 and such damages as were recoverable for injuries of like character prior to the passage of the Act.

Furthermore the damages must necessarily be only such as were proven by the evidence as the Act of Congress does not permit a recovery for such a sum as to a jury "seem- just and fair."

In the giving of the instruction complained of over the objection of the said The Chesapeake and Ohio Railway Company it was deprived of a right, privilege and immunity claimed under a law of the United States.

Third. The Supreme Court of Appeals of Virginia erred in affirming (and not reversing) the ruling and judgment of the said Circuit Court of the County of Hanover, in overruling the motion of the said The Chesapeake and Ohio Railway Company seasonably made, to set aside the verdict of the jury and to award it a new trial on the following grounds: (*a*) the verdict was contrary to the law and the evidence; (*b*) the jury was misdirected by the Court in its instructions; (*c*) the damages were excessive, and (*d*) the jury was not summoned, selected, formed and constituted in accordance with Article VII, of the amendment- of the Constitution of the United States and the laws passed in pursuance thereof.

Wherefore for these and other manifest errors, The Chesapeake and Ohio Railway Company prays that the aforesaid judgment of the Supreme Court of Appeals of Virginia be reversed, set aside and held for naught; that said Railway Company be restored to all things it has lost by reason of the said judgment; that judgment be rendered in favor of said Railway Company, granting, upholding and enforcing its rights under the Constitution and laws of the United States; and the said Railway Company also prays for its costs, and for general relief.

123 DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

Filed with petition for writ of error:

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

124 To the Honorable Justices of the Supreme Court of the United States:

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
vs.
ASA P. CARNAHAN, Defendant in Error.

Prayer for Reversal.

And now comes The Chesapeake and Ohio Railway Company, the Plaintiff in Error, and prays for a reversal of the judgment of the Supreme Court of Appeals of Virginia, in the action lately pending in the last-named court wherein your petitioner, The Chesapeake and Ohio Railway Company, was plaintiff (being designated as Plaintiff in Error in the last-named court) and Asa P. Carnahan was defendant (being designated as Defendant in Error in the last-named court) which judgment was entered by the last-named court on or about the 11th day of November, 1915, and your petitioner also prays for a reversal of the order and judgment entered in said action by the last-named court on or about the 11th day of November, 1915, affirming the order and judgment rendered in favor of Asa P. Carnahan against your petitioner, by the Circuit Court of the County of Hanover on the 25th day of March, 1914.

DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

125 Supreme Court of Appeals of Virginia, at Richmond.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
vs.
ASA P. CARNAHAN.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of Appeals of Virginia, the plaintiff, The Chesapeake and Ohio Railway Company (being designated as plaintiff in error in said Court) prays a writ or error from the said decision and judgment to the Supreme Court of the United States and files herewith its assignment of errors.

DAVID H. LEAKE,
WALTER LEAKE,
Attorneys for The Chesapeake and Ohio Railway Company (Richmond, Virginia).

STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ of error issue upon the execution of a bond by The Chesapeake and Ohio Railway Company, in the sum of thirty thousand dollars; said bond to act as a supersedeas.

Dated Nov. 19th, 1915.

JAMES KEITH,
President of the Supreme Court of
Supreme Court of *Appeals of Virginia.*

126 Supreme Court of the United States.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
vs.
ASA P. CARNAHAN, Defendant in Error.

Bond.

Know all men by these presents: That we, The Chesapeake and Ohio Railway Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Asa P. Carnahan, in the sum of thirty thousand dollars, to be paid to the said Asa P. Carnahan, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

In verification whereof, The said The Chesapeake and Ohio Railway Company has caused these presents to be signed by Decatur Axtell, its Vice-President, thereunto lawfully authorized and its corporate seal to be hereunto affixed, and the said United States Fidelity and Guaranty Company has caused these presents to be signed by E. Leslie Spence, Jr., its Attorney in Fact, thereunto lawfully authorized; and its corporate seal to be hereunto affixed this 20 day of Nov., 1915.

Whereas, The above-named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of the State of Virginia.

Now therefore, The condition of the obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

127 [Seal Chesapeake & Ohio Railway Co., July 1, 1878.]
THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
(Signed) By DECATUR AXTELL, *Vice-President.*

Attest:
(Signed) MEADE SPICER, *Ass't Secretary.*

[Seal U. S. Fidelity & Guaranty Co.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By E. LESLIE SPENCE,
Attorney in Fact.

Signed, sealed and delivered in the presence of—
H. STEWART JONES.

The above bond is approved.
(Signed) JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Original. Recei'd & filed Nov. 20th *day of Nov. 20,* 1915. H. Stewart Jones, Clerk.

128 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the *The* Chesapeake and Ohio Railway Company, Plaintiff in Error, and Asa P. Carnahan, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
129 concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the City of Washington, District of Columbia, on Wednesday, the 29th day of December, 1915, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the

United States, the 20th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States District Court
for the Eastern District of Virginia,
By R. E. POWERS,
Deputy Clerk of said Court.

Allowed by
JAMES KEITH.

[Endorsed:] Received & filed Nov. 20, 1915. H. Stewart Jones, Clerk Supreme Court of Appeals.

130 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Asa P. Carnahan, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Virginia, wherein The Chesapeake and Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of Virginia, this 20th day of November, 1915.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of
Appeals of Virginia.

Legal service of the above citation is hereby acknowledged this 23rd day of November, 1915.

C. W. ALLEN,
Attorney for Asa P. Carnahan.
N. W. WALSH,
Att'y for Asa P. Carnahan.

131 STATE OF VIRGINIA,
Supreme Court of Appeals, Richmond:

H. Stewart Jones, Clerk, Richmond, Va.

Nov. 27th, 1915.

Return to Writ.

UNITED STATES OF AMERICA.
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the Supreme Court of Appeals of the State of Virginia, in the City of Richmond, this November 27, 1915.

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond.

Plaintiff in error's costs $57.29.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Teste:
H. STEWART JONES, *Clerk.*

Endorsed on cover: File No. 25,026. Virginia Supreme Court of Appeals. Term No. 743. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. Asa P. Carnahan. Filed December 8th, 1915. File No. 25,026.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 743.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error awarded to a judgment of the Supreme Court of Appeals of Virginia, affirming a judgment of the Circuit Court of Hanover county, Virginia, upon the verdict of a jury, for $25,000 damages, in an action at law under the Employers' Liability Act of Con-

gress of April 22, 1908 (35 St. at L. 65, Chap. 149) as amended by Act of April 5, 1910 (36 St. at L. 291).

SUMMARY OF THE EVIDENCE.

ASA P. CARNAHAN, hereinafter spoken of as the plaintiff, was a fireman in the employment of the THE CHESAPEAKE AND OHIO RAILWAY COMPANY, hereinafter spoken of as the defendant, and lost his leg as the result of a collision between a train of the defendant and certain cars belonging to the defendant situated on its track at Doswell, Virginia, on March 7, 1913.

The plaintiff was a fireman on train No. 97, Engine No. 199, in charge of Engineman E. L. Bailey and Conductor William McGraw, which left Richmond at 12:40 A. M., March 7, 1913, West bound. This train, besides the engine and tender, consisted of seven empty tourist sleepers, six of which were being moved "dead-head" (*i. e.*, without passengers or freight) from Richmond, Virginia, to Cincinnati, Ohio. The seventh tourist sleeper on this car was to be delivered to the Kanawha & Michigan Railway at Charleston, West Virginia.

It appears that an extra train of defendant known as Extra 596 West, in charge of Engineman M. E. Lane and Conductor J. B. Shisler had some time previously moved from Richmond, Virginia, to Doswell, Virginia, with several loaded cars to be delivered to the R. F. & P. R. R. Co. at Doswell, Virginia (a junction point with said railroad), with instructions to pick up certain empty coal cars of the defendant which were at Doswell, Virginia, and bring them to Richmond. At the time of the collision wherein the plaintiff suffered the injuries of which he complains, this latter train had carried and delivered its loaded cars at Doswell, and was collecting the empty cars referred to upon the main track at Doswell, preparatory to forming a train of said empty cars to be hauled back to Richmond to be designated as Extra 596 East.

The train upon which Carnahan was fireman, known as Train No. 97, Engine 199, arrived at Doswell about 2 o'clock A. M. Upon approaching Doswell and before crossing the tracks of the R. F. & P. R. R. Co. at that point it received a signal to stop operated by the telegraph operator in the tower at that point.

Referring to this signal the plaintiff said (Rec., p. 27):

> "We stopped, on the red signal, I should say six or seven minutes; by the time we got the white signal (the signal to proceed) the engineer used the proper signal to call the flag in (*i. e.*, the flagman protecting his train) and the flagman came in and the proper signal was answered and we proceeded with a clear signal. There was no signal for orders. Under those signals, that is, the signal we got, we are supposed to have the main line movement and the right of track for 27 miles."

What the plaintiff meant was that the train had been held up some time by a signal which prevented it proceeding and that after being there six or seven minutes this signal was withdrawn and a signal given to proceed which indicated to the trainmen that the road ahead was clear, and that there were no signals given indicative that the train was to receive any orders at that station. The signals given, however, did not relieve Carnahan or any of the train crew of his train from the duties ordinarily incumbent upon them to look-out ahead, give proper signals and the like.

It appears that this train (No. 97, West bound) had originally been halted by the signal referred to on account of the fact that there were certain cars on the main track at Doswell, being collected there, to be brought back to Richmond that night by the train hereinbefore referred to as Extra 596 East. At this time there was a series or "cut" of cars coupled together, standing on the main track,

some distance west of Doswell Station, just west of a road crossing there. The R. F. & P. crossing is some distance east of the station, a short distance east of the tower, where the telegraph operator was, and the train upon which the plaintiff was fireman was east of the crossing. These cars were standing on the main track without any lights protecting them. The engine of this train was standing on the side track preparatory to shifting some other cars into this "cut" of cars standing on the main track and which were to be taken to Richmond. Carnahan saw this engine and knew a train was at the station, but states he didn't know any cars were standing on the main line.

He then states (Rec., p. 27):

> "Well, after seeing that we had the main line movement, and a clear block—that is, I mean no orders for us, and it indicated to us that we had the block (*i. e.*, clear track) for 27 miles—I had nothing to do but to begin firing the engine; in other words, I hooked the fire over and began to put in a little fire at a time—not but two or three shovelsfull—in order to keep up the pressure and get away from there; it is upgrade and we had a very small engine, of the old type, and it caused constant firing; we had to keep putting in a little coal, one shovelful right after another very nearly, in order to keep up steam and not get stalled and stop to blow up steam. I did that up to the moment the collision occurred, and had just got in a position to get up on the corner of the seat box to reach for the bell cord; I don't remember whether I ever got hold of the bell to give it a pull, and by that time we ran into those cars."

In the collision that followed the plaintiff was caught from his knee of his right leg, down, between the tank on the tender and the boiler head in the cab of his engine and

remained pinned in that position for forty-five or fifty minutes, before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for this injury he brought suit.

The explanation of this catastrophe is as follows:

Upon the approach of train No. 97 at Doswell, the operator there, J. W. Beasley, who was in the tower and who controlled the signals and switches as well, being advised of the fact that there were cars standing on the main track gave the signal which halted the west bound train some distance east of the station. Conductor Shisler, who had charge of the making up of the train which was to leave Doswell for Richmond with the empty cars then being switched to form the train was apprised of the arrival of No. 97 at the signal where it was halted shortly after its arrival. The situation of his train there is explained in his evidence as follows:

He had about fifteen or sixteen cars standing on the main line; the caboose was on the west end of those cars, but there was nothing attached to the east end, the engine being at that time on a side track there. It further appears that there were no lights of any sort on the east end of the cars, that is facing the direction from which train No. 97 approached, and there were no flagmen placed there to protect the cars.

The operator of the tower was fully aware of the fact that the cars were on the main track. Conductor Shisler and Brakeman T. D. Blue, connected with the train crew of the train being made up at Doswell, then went into the tower, or telegraph office, to confer with the operator as to what arrangements were to be made to let train No. 97, which was waiting there, go by the station. What these arrangements were is the subject of a dispute between Conductor Shisler and Brakeman Blue on the one hand and

Operator Beasley on the other. The two latter witnesses testify that Operator Beasley told them he would turn the train standing there (No. 97, west-bound) through a side-track, that is around the cars standing on the main line, and thus allow it to proceed on its route; the operator (Beasley) being able through his levers, etc., to control the switching at that point.

Operator Beasley stated that he understood from the conversation that Conductor Shisler would arrange the switches, etc., to let train No. 97 pass, it appearing that the switches could be as well arranged by some person on the ground as through the instrumentality of the levers in the tower. The gist of the matter seems to be that there was a misunderstanding as to who was to make the arrangements for train No. 97 to pass the cars standing on the track. The result was that Operator Beasley gave train No. 97 a signal to proceed, relying upon Conductor Shisler to arrange for it to pass the cars, and Conductor Shisler and Brakeman Blue, thinking Operator Beasley was going to do this took no precautions whatever to keep the train from running into the cars on the track, the result being the collision referred to. The speed at which train No. 97 was running was ten or fifteen miles an hour.

After leaving the telegraph office or tower Brakeman Blue seems to have gone over on the side track where some cars were standing which were probably presently to be shifted by the engine of his train, then on the same track. He observed the approach of train No. 97 on the main line which had been given a signal to proceed by Operator Beasley and soon saw that a collision was imminent. He then endeavored by calling out and waiving his lantern, to avert the collision, but no one on that train seems to have observed his signals. Had the engineman or the fireman who was injured, Carnahan, observed this warning it appears that they could have probably stopped the train in time to have avoided the accident.

While there was no light of any sort placed as a warning on the cars standing on the track, the engine of train No. 97 was equipped with an oil headlight, the character of which would have enabled the engineman or fireman to have seen the cars standing on the track in time to have stopped before reaching them. It was the duty of the plaintiff to look ahead as far as practicable. He endeavored to explain his failure to observe these cars standing on the track by saying that he was shovelling coal and had not ceased very long before the collision occurred. It appeared that he passed a word with the fireman of the engine standing on the side track there (J. L. Hartman) as he passed that engine, but just what he was doing then is not at all clear.

Just before the collision occurred he was reaching for the bell cord to ring for the crossing beyond which the cars were standing on the track. Even then had he observed the cars it is not improbable a collision could have been averted as the train could have been stopped within at least fifty feet, and the signal for the crossing was necessary to be given some distance from the crossing.

Pleadings, and Trial Proceedings.

The declaration contained four counts. The first two counts charged that plaintiff and defendant were engaged in interstate commerce thus alleging a cause of action under the Employers' Liability Act of Congress. One of these was based upon the alleged negligence of the train crew of the train standing at Doswell under Conductor Shisler's charge. The other was based upon the alleged negligence of Operator Beasley. The other two counts were based upon the same grounds of negligence save that they omitted any allegation as to the parties being engaged in interstate commerce thus alleging a cause of action under the State laws.

There was a demurrer to the declaration based upon the ground that it was improper to combine in one suit a cause of action under the Employers' Liability Act of Congress and the State law. This demurrer the court overruled. It early appeared, in the progress of the trial, that the parties were engaged in interstate commerce at the time the plaintiff was injured so the court instructed the jury eventually, at the instance of the plaintiff, that they should disregard the third and fourth counts of the declaration, *i. e.* those based on a cause of action under the State law.

The case was tried before a regular jury consisting under the State law of only seven men (see appendix) and before the regular panel of nine veniremen had been sworn on their *voir dire*, and before any members of the panel had been stricken off, as allowed by law, the defendant challenged the array of jurors and moved to quash the venire upon the grounds that (1) the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States and the laws of the United States passed in pursuance thereof and (2) the trial of the case before the jury as summoned, formed, selected and constituted deprived the defendant of rights, privileges and immunities guaranteed to it by the Constitution of the United States and the laws of the United States passed in pursuance thereof. This motion the court overruled and thereupon the defendant excepted.

After all the evidence in the case had been introduced the plaintiff asked for four instructions, numbered respectively, I, II, III and IV, all of which the court gave. To the giving of the instructions numbered II and III the defendant excepted. The defendant asked for four instructions marked, respectively, (a), (b), (c), and (d). Of these the court gave instructions (a) and (b) and declined to give instructions (c) and (d) to which action of the court the defendant excepted.

After the jury had returned their verdict for the plaintiff for $25,000 damages, the defendant moved the court to set aside the verdict of the jury and award it a new trial upon the grounds that (1) it was contrary to the law and evidence; (2) the jury was misdirected by the court, in its instructions (3) the damages were excessive and (4) the jury was not summoned, selected, formed and constituted in accordance with Article VII of the Amendments of the Constitution of the United States and the laws passed in pursuance thereof. This motion the court overruled and the defendant excepted.

The defendant then moved in arrest of judgment on the ground that the court should have sustained the demurrer to the declaration for the reason that the defendant having been impleaded in an alleged cause of action arising under the Federal law and another under the State law, at the same time, was deprived of rights, privileges and immunities arising from the statutes and Constitution of the United States and was a denial of due process of law. This motion the court overruled, to which action of the court the defendant excepted.

A writ of error was awarded to the judgment of the Circuit Court of Hanover county, by the Supreme Court of Appeals of Virginia, upon several assignments of error, two of which are in substance the same as the two assignments of error relied upon in this court. That court however, affirmed the judgment, but the presiding judge awarded a writ of error to this court.

Assignments of Error.

First. The Supreme Court of Appeals of Virginia erred in holding and deciding that the trial of this case was properly had before a jury of seven men, selected and chosen under the laws of the State of Virginia, and that the said The Chesapeake and Ohio Railway Company was not en-

titled to the trial of said action at law by a jury of twelve men, and in affirming (and not reversing) the ruling of the Circuit Court of the County of Hanover, in this regard.

The said The Chesapeake and Ohio Railway Company seasonably set up and claimed the right to have the case tried by and before a jury of twelve men, under and by virtue of the Constitution of the United States and the laws passed in pursuance thereof, particularly the Seventh Amendment to the Constitution of the United States, and the decision of the Supreme Court of Appeals of Virginia thus deprives the said The Chesapeake and Ohio Railway Company of rights, privileges and immunities, claimed under the Constitution of the United States.

Second. The Supreme Court of Appeals of Virginia erred in holding and deciding that the instruction designated as instruction "III," given to the jury by the judge of the Circuit Court of the County of Hanover, over the objection of the said The Chesapeake and Ohio Railway Company was proper and in affirming (and not reversing) the ruling of the said Circuit Court of the County of Hanover in this regard.

The said instruction was as follows:

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

This instruction is objectionable on the following grounds: (a) it allows a recovery in damages not only for the damages proximately resulting from the injury, but also

for "its effects upon his future," which involves a consideration of consequences which might be essentially speculative and remote and for which there could be no recovery in damages and (b) it tells the jury the damages are not to be "in excess of $35,000.00, as to them may seem just and fair," thus pointing out and calling the attention of the jury to a certain sum which they might find as damages and giving judicial approval to that amount, and allows the jury to assess such damages, not exceeding that amount as to them might seem just and fair, without stating that the damages should be only such as were proven by the evidence.

Under the Act of Congress of April 22, 1908, known as the "Employers' Liability Act," a carrier is made "liable in damages" to a person suffering injury under certain conditions therein set forth, for such injuries.

The necessary implication from the language of the act is that the damages for which a defendant is liable are such as appear by the evidence to have proximately resulted from such injuries and such damages as were recoverable for injuries of like character prior to the passage of the act.

Furthermore the damages must necessarily be only such as were proven by the evidence as the act of Congress does not permit a recovery for such a sum as to a jury "seem just and fair."

In the giving of the instruction complained of over the objection of the said The Chesapeake and Ohio Railway Company it was deprived of a right, privilege and immunity claimed under a law of the United States.

ARGUMENT.

(1)

The Circuit Court of the County of Hanover, Virginia sitting with a jury consisting of only seven men was without power to try the case.

As above set out the case was tried, over the defendant's objection, with the regular jury provided for by the laws of Virginia, which consists of only seven men. We believe that in the trial of cases under the Employers' Liability Act of Congress the parties are entitled to a common law jury of twelve men, as provided for by the Seventh Amendment to the Constitution of the United States, and we rely upon the joint brief on that subject filed in the cases now heard together, for argument upon that point.

It may be observed that the State court in this case had it within its power to furnish a jury of twelve men. (See Appendix, Va. Code, section 3158.)

The Virginia courts have held, however, that the allowance or refusal of a special jury of twelve as provided for in this section, is a matter of discretion with the trial judge (*Atlantic and D. R. Co.* v. *Peake*, 87 Va. 130, 12 S. E. 348), and the court so held in the instant case (*C. & O. Ry. Co.* v. *Carnahan*, 86 S. E. 863), and so justified the trial court in its refusal to furnish such a jury (Record p. 72).

For reasons stated in the joint brief it must follow that the trial court had either no discretion in the matter of furnishing a jury of twelve men under that section, or else the court was so constituted as to be incompetent to try the case.

(2)

The instruction numbered "III" as to the measure of damages was erroneous in that it allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35.000; *and allowed the jury to give such sum as damages as to them might "seem just and fair," without stating that the damages could be only such as were proven by the evidence to have proximately resulted from the negligent act complained of.*

This instruction was as follows:

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however in excess of $35,000 as to them may seem just and fair."

In the case of *Central Vermont Ry. Co.* v. *White*, 238 U. S. 512, this court held that Congress, in passing the Federal Employers' Liability Act, evidently intended that the Federal statute should be construed in the light of previous decisions of the Federal courts in all substantive matters, such as for instance, the rule as to burden of proof where contributory negligence is relied upon.

Referring to the latitude allowed State courts in the trial of cases under the act it is there said (238 U. S. 511):

> "As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the State court can, in these and similar instances, follow their own practice even in the trial of suits arising under the Federal law."

But "a substantive right or defense arising the Federal law cannot be lessened or destroyed by a rule of procedure." *Norfolk, &c. R. Co.* v. *Ferebee*, 238 U. S. 269.

See, also, *A. C. L. Ry. Co.* v. *Burnette*, 239 U. S. 199.

If the rule as to the burden of proof on the question of contributory negligence is a matter of substance, it would

likewise seem that the rule as to the proper measure of damages, and the elements thereof, is necessarily one of substance. In fact the contributory negligence of the plaintiff is merely a question involving the measure of damages under the act and if the question of the burden of proof as to an element of damages is a matter of substance, necessarily the elements of damage themselves are such.

By the instruction complained of the plaintiff is allowed to recover among other things for the injury received by him and "its effects upon his future."

By this language the jury were "given occasion for indefinite speculation" and they were invited to "a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts."

Norfolk & W. Co. v. *Holbrook*, 235 U. S. 630;
See, also, *R. & D. R. Co.* v. *Elliott*, 149 U. S. 266, 269;
Boston and A. R. Co. v. *O'Reilly*, 158 U. S. 334.

The language was broad enough to cover not only prospective loss from collateral undertakings, specifically condemned in the case last cited, but also possible future physical effects from the injury, such as future pain and suffering, of which there is no evidence in the record. In fact broader language than that used is hardly conceivable.

In order for a recovery for future pain and suffering to be allowable there must be evidence tending to show that such pain was reasonably certain to result from the injury.

Kennon v. *Gilmer*, 131 U. S. 22, 26:
Washington & G. R. Co. v. *Harman*, 147 U. S. 584;
McDermott v. *Severe*, 202 U. S. 600;
See, also, *Smith* v. *Milwaukee*, 91 Wis. 360;
Block v. *Milwaukee*, 89 Wis. 371;
Ford v. *DesMoines*, 106 Iowa 94;
Shultz v. *Griffith*, 103 Iowa 150;
N. &c. R. Co. v. *Spratley*, 103 Va. 388;
Watson on Per. Inj., section 604, p. 720.

The instruction further invaded the province of the jury by pointing to the sum of $35,000 as the amount to which they could go in estimating damages, without stating that the sum was mentioned merely because it was the amount claimed in the declaration. Thus judicial approval was given to a certain sum which could be found as damages, which was improper.

The Supreme Court of Appeals of Virginia in its opinion recognizes this objection, but holds that the objection was cured by the further statement in the instruction that the damages they might allow should be such as "seem to them just and fair" (Record p. 78).

But this language is in itself highly objectionable.

It is not the province of a jury to allow such damages as "seem to them just and fair," but they can only give the damages proven by the evidence to have been the natural and proximate result of the negligent act complained of.

Milwaukee v. *Kellogg*, 94 U. S. 469;
Sheffer v. *Railroad Co.*, 105 U. S. 249;
Vance v. *Vandercook Co.*, 170 U. S. 468;
Allison v. *Fredericksburg*, 112 Va. 243;
Fowlkes v. *Southern R. Co.*, 96 Va. 464.

The instruction further practically intimates to the jury that the sum of $35,000 was both just and fair, or at least that such a sum was neither unjust nor unfair.

From what has been said it is apparent that the instruction complained of was erroneous and highly prejudicial, and accounts in no small measure for the enormous verdict in this case.

For the reasons set out above we ask that the judgment of the Supreme Court of Appeals of Virginia be reversed.

DAVID H. LEAKE,
WALTER LEAKE,
for The C. & O. Railway Company.

APPENDIX.

PROVISIONS OF THE CONSTITUTION AND STATUTES OF VIRGINIA IN RELATION TO JURY TRIALS.

The Constitution of Virginia, Article I, Section 11:

> "*No person to be deprived of property without due process of law; trial by jury to be held sacred.*
>
> "That no person shall be deprived of his property without due process of law, and in controversies respecting property and in suits between man and man, trial by jury is preferable to any other and ought to be held sacred; but the General Assembly may limit the number of jurors for civil cases in Circuit and Corporation Courts to not less than five in cases now cognizable by justices of the peace or to not less than seven in cases not so cognizable."

Virginia Code, 1904:

> "Sec. 3166.—*Waiver of trial by jury; number of jurors for trial of civil cases.* In any case, unless one of the parties demand that the case be tried by a jury, the whole matter of law and of fact may be heard and determined, and judgment given by the court. In civil cases the jury shall consist of five persons in cases now cognizable by justices of the peace, and of seven in cases not so cognizable. And in any case in which the consent of the plaintiff and defendant shall be entered of record it shall be lawful for the plaintiff to select one person, who is eligible as a juror, and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall con-

stitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven; provided, this section shall not be so construed as to affect in any way the empanelling of special juries as provided in section thirty-one hundred and fifty-eight (1870-71, p. 53; 1902-3-4, p. 605)."

Virginia Code, 1904:

"Sec. 3158—*How Special Juries Formed*—Any court, in a case where a jury is required, may allow a special jury, which shall be formed in the following manner: The court shall order such persons to be summoned, as it shall designate for the purpose, and from those summoned, a panel of twenty qualified jurors, free from just cause of exception, shall be made, from which sixteen shall be chosen by lot. Thereupon, the parties or their counsel, beginning with the plaintiff, shall alternately strike off one from the sixteen so chosen, until the number is reduced to twelve, who shall compose the jury for the trial of the cause. If the parties or their counsel decline or fail to strike off any from the sixteen, or if, after one or more has been stricken off and the number remaining is greater than twelve, the party or his counsel, entitled next in order to strike off, decline or fail to do so, then a jury of twelve for the trial of the cause shall be chosen by lot from the sixteen or the number remaining as aforesaid, as the case may be. (1874, p. 133)."

Virginia Code, 1904:

"Sec. 3154—*Examination of Juror as to Interest, Prejudice, etc.; If Not Indifferent Another to be Supplied.*—The court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that cause. And in every case the plaintiff and defendant may each challenge one juror peremptorily, where the jury consists of seven. (1852-3, p. 45; 1902-3-4, p. 944; 1904, p. 73)."

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Supreme Court of the United States

OCTOBER TERM, 1915

(Heard with No. 321.)

No. 743

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

ASA P. CARNAHAN

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF OF COUNSEL FOR ASA P. CARNAHAN, DEFENDANT IN ERROR.

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The statement of the case contained in the brief of counsel for plaintiff in error, Chesapeake & Ohio Railway Company sets forth the facts sufficiently and we see no occasion to restate the general facts. Such phases as may require a statement in further detail or modification will be mentioned in connection with the discussion on which they specifically bear.

In this brief we shall adopt the same designation for the parties which is used in brief of plaintiff in error, and also in the opinion of Judge Cardwell of the Court of Appeals of Virginia, that is, the plaintiff in error railway company, being

the defendant in the trial court, will be called the defendant, and the defendant in error, Carnahan, being the plaintiff in the trial court, will be called, the plaintiff.

FIRST ASSIGNMENT OF ERROR.

This assignment of error concerns the jurisdiction of the trial court in view of the provisions of the Virginia Code that in civil cases the jury in cases not cognizable by a justice (whose jurisdiction is limited to $100.00) shall consist of seven.

The Supreme Court of Appeals of Virginia has held that the case was properly tried by a jury of seven, indeed has held that it could be tried in no other way. The court said:

> "How else is a State Court to exercise its jurisdiction in such a case except according to the procedure provided for in its own statutes? The statutes of this state make no provision for a trial in civil cases by a jury of twelve, except for some special reason when a special jury may be summoned under section 3158 of the Code, and the allowance or refusal of a special jury is a matter resting in the sound discretion of the court. A. & D. R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348."

As the question whether a jury of twelve might have been provided under state law, section 3158 (quoted in the brief of the Railway Company Appendix, p. II), is a matter wholly of construction of local statutes and state practice, involving no federal matter, we see no occasion to discuss it further.

The contention presented in this assignment of error, that rights arising under a law of the United States may be enforced only in courts providing methods of trial prescribed by the Constitution of the United States has been discussed somewhat elaborately in a joint brief of counsel for defendants in error in the several cases which are heard with this case. The views there presented are adopted here. It is submitted that the contention is unsound, both in reason and authority, and this assignment of error sould be overruled.

The discussion of the question by the Supreme Court of Appeals found on page 70 of the Record is more elaborate than in any other case in the books and particular attention is drawn to it.

SECOND ASSIGNMENT OF ERROR.

In this assignment of error the plaintiff presents certain objections to the language of Instruction III which concerned damages recoverable by this plaintiff.

This instruction presented the general law on the subject of damages recoverable in actions for personal injuries, so far as applicable to this case. The principles there enunciated are recognized not as peculiar to the law of Virginia, but as conforming to the general law, which is the law in the light of which the Federal Employer's Liability Act is to be construed. There is in this assignment of error no matter of construction of the Employer's Liability Act, or in the words of this court in Yazoo & Miss. Valley R. Co. *v.* Wright, 235 U. S. 376, 59 L. Ed. 277, 278, "there is no contention as to its meaning, hence * * *" it is only necessary to * * * "determine whether plain error was committed in relation to the principles of general law involved."

The instruction was as follows (Printed Record, p. 67):

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then, in assessing damages against the defendant they may take in consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, assessing such damages not however in excess of $35,000.00 as to them may seem just and fair."

(1) It is said in the assignment that this instruction "allowed the jury to indulge in speculation and conjecture," and

in the argument in the brief this somewhat intangible specification is more concretely put thus:

> "The language was broad enough to cover not only prospective loss from collateral undertakings * * * but also possible future physical effects from the injury, such as future pain and suffering, of which there is no evidence in the record."

But the instruction must be read and its effect upon the verdict judged in the light of the evidence. Indeed the court so instructed the jury in Instruction IV (Printed Record, p. 67):

> "The court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case."

To sustain the contention, that under this instruction the jury took into consideration prospective loss from collateral undertakings, it is necessary to say that the jury not only took into consideration matters which were not in evidence, but matters which they were expressly instructed not to consider.

For the court was very careful upon defendant's objection to exclude all evidence of possibility of promotion and of possible increased earnings. See Printed Record, pp. 35, 36. And not a scintilla of evidence tending to prove matters speculative or remote will be found. And more, it appears that the jury were expressly instructed not to take into consideration such matters. On the Printed Record, p. 68, we find that the judge,

> "cautioned counsel when discussing the plaintiff's damages that there was no evidence in the record of the plaintiff's prospects of promotion and orally instructed the jury that they should not take into consideration any probable promotion which might come to the plaintiff or any probable increase in the earning capacity of the plaintiff."

That a court cannot assume that the jury disregarded an instruction is, of course, a fundamental tenet in the orderly administration of justice.

In Graham *v.* U. S., 231 U. S. 474, 58 L. Ed. 319, it is said:

"It would be absurd to upset a verdict upon the speculation that the jury did not do their duty or follow the instructions of the court."

In Pennsylvania Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141, 145, the trial court had admitted certain evidence improperly and then instructed the jury that they should disregard it. Of the effect of such an instruction the court said:

"The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. * * * The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be so far as the court is concerned, that the jury were influenced in their verdict only by legal evidence."

In Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50, 58, it was insisted by plaintiffs in error that an instruction which mentioned as an item of damages to be allowed to the plaintiff "the loss of his wages" was obnoxious as permitting the jury to include the total wages which he might have earned, although he was not totally incapacitated. But the court said:

"In the discussion of such questions the courts proceed upon the theory that the jurors are possessed of ordinary intelligence. The language used by the court would naturally be understood as having reference solely to the testimony that had been admitted. The fact is that Hall was not entirely incapacitated from earning wages. His earning capacity was decreased to the extent of his inability to perform labor and earn wages as he might reasonably have been able to do if he had not been injured, and to this extent the jury should take into consideration 'the loss of his wages.'"

Thus the instruction cannot be said to be obnoxious in that under it the jury might have considered prospective loss from collateral undertakings. For there was no evidence in the

record of a conjectural character, and furthermore the jury were specifically and in a most emphatic and dramatic manner instructed "that they should not take into consideration any probable promotion or any probable increase in the earning capacity of the plaintiff."

Of course, counsel do not mean to contend that no consideration should be given by the jury to the effect of the injury upon the plaintiff's future. Future damages must be recovered in this one action. The injury is entire and it is the duty of the jury to assess the plaintiff's entire loss, past and future. While it may be true that any particular loss in future may not be considered as being speculative and remote, it is also true that the jury should consider his loss in future. This distinction is well illustrated in R. & D. Ry. Co. *v.* Elliott, 149 U. S. 266, 37 L. Ed. 728, 731, cited by counsel for defendant railway company. There it was held that the particular losses the plaintiff sustained and his possible promotion could not be considered, but what the future holds for such an one in general, was, of course, to be considered. The court says:

> "Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing (Wade *v.* Leroy, 61 U. S. (20 How.) 34 (15: 813); Nebraska City *v.* Campbell, 67 U. S. (2 Black) 590 (17: 271); Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 554 (30:

257, 258) the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion."

In Denver & Rio Grande R. Co. *v.* Roller, 100 Fed. 738; 41 C. C. A. 22, 34, the trial court gave an instruction that:

"These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries; and if said injuries are permanent, or if she has not recovered from them, such damages, also, as you may find from the evidence, it is fair to believe she will suffer from said injury in the future." On exception

Held: "This part of the charge was unquestionably correct. It is, of course, to be considered with reference to the facts, and to previous portions of the charge."

See also, Washington & G. R. Co. *v.* Tobriner (Harmon), 147 U. S. 571, 37 L. Ed. 284; McDermott *v.* Severe, 202 U. S. 600, 610; 50 L. Ed. 1162, 1168; Chesapeake & Ohio R. Co. *v.* Hoff[illegible] 109 Va. 44, 66.

The other phase of the objection to the clause of this instruction relative to future damages is that it was "broad enough to cover all possible future physical effects from the injury such as future pain and suffering of which there is no evidence."

"To read the instruction as including future pain and suffering requires us to supply a predicate of 'its' not in the instruction, i. e., the injury. The evident predicate of 'its' is loss of power and capacity for work." And under this instruction the future damages are confined to those due to loss of power and capacity for work. The Court of Appeals said of this interpretation (Printed Record, p. 77):

"It would be a strained construction of the language of the instruction, 'its effects upon his future,' to hold that it refers to future suffering, and that damages not the proximate result of plaintiff's injuries could have been included under the instruction. Not only so, the instruction enumerated accurately the elements of damages that the jury

were to take into consideration, and at the instance of the defendant the court instructed them 'that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant.' "

And the particular objection that in the record was no evidence of future pain and suffering is most certainly unfounded. See Printed Record, pp. 29 and 30: The plaintiff at the time of the trial still on occasions suffered pain and attacks of nervousness when he could not sleep; the wound had not healed although the injury had occurred more than a year previous to the trial, and when he attempted the use of an artificial limb, he suffered great pain. Certainly the jury might consider these matters and could with propriety, form conclusions. Expert evidence is not the only evidence in matter of this kind. The facts may be relied upon to speak in matters of this kind with sufficient accuracy. In fact, in Norfolk Ry. Co. *v.* Spratley, 103 Va. 379, *supra,* counsel for the defendant objected to expert evidence as improper.

Nor is direct evidence of future pain and suffering essential to justify the jury in considering future pain and suffering in their estimate of damages.

In Dist. of Col. *v.* Woodberry, 136 U. S. 450; 34 L. Ed. 472, 475, it is said:

" 'All evidence tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, was pertiment to the issues,' citing cases. 'The authorities all agree that in cases of this character (personal injury) much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering resulting from such injuries, is necessarily attended by mental suffering in a greater or less degree.' "

In Kennon *v.* Gilmer, 131 U. S. 22, 33 L. Ed. 110, 112, it is said:

"The action is for an injury to the person of an intelligent being; and when the injury, whether caused by wilfulness or negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases."

In McDermott *v.* Severe, 202 U. S. 600, 610; 50 L. Ed. 1162, 1168, the jury's duty in connection with future damages is most broadly illustrated. There a child six years old had been so injured that amputation of the leg above the ankle was necessary. The instruction to the jury detailing the elements of damage to be considered was as follows:

"The jury are instructed that, if they find a verdict for the plaintiff, they should render a verdict in his favor for such a sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and from the loss of his leg; for the inconvenience to which he has been put, and which he will be likely to be put, during the remainder of his life, in consequence of the loss of his leg; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequent of the loss of his leg, and for such pecuniary loss, as the direct result of the injury, which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his legs."

The record in that case did not and of course could not disclose directly the mental suffering which a child of six might undergo by reason of embarrassment in the loss of a foot. That depended upon many factors which could not be set forth with certainty, such as temperament when grown, vocation in life, location in the country. Yet it was the duty of the defendant to recompense the plaintiff for that loss and the jury as best they could were instructed to arrive at

it. Certainly much more direct and positive is this record in regard to the pain the plaintiff will suffer for he is a grown man, of formed habits, and for a year at the time of the trial the wound had been healing and he had been undergoing the changes in its condition and its effect upon his system.

In Watson on Personal Injuries, section 387, a textwriter often quoted by the courts (see Norfolk Ry. Co. *v.* Spratley, *supra*) it is said:

> "Specific proof of physical pain is unnecessary. It is sufficiently shown by evidence which discloses the nature, character and extent of the injuries. Nor need the evidence which will warrant a recovery for future pain be direct and positive, if the injury proved is of a nature from which future pain is reasonably certain to result."

Thus it will be seen that the instruction by its terms does not take into consideration future suffering but only future loss due to loss of capacity and power for work. And more, that the record amply justified an instruction broad enough to cover future suffering.

(2) It is further objected that this instruction invaded the province of the jury in that after mentioning the various matters which they might take into consideration, it concluded with the clause, "not in excess of $35,000.00, as to them may seem just and fair." It is contended the mention of the sum in excess of which the jury might not find, stamped that sum with judicial approval as a sum they should find. But so to say, is to strike out the clause "as to them may seem just and fair." For that clause relegated the amount of the damages to the jury and by it the court expressly disclaims any suggestion as to the amount to be found, any intimation in the matter.

In N. & W. R. Co. *v.* Earnest, 229 U. S. 114, 119; 57 L. Ed. 1096, 1100, of a similar contention, the court said:

> "The declaration alleged that the plaintiffs damages amounted to $20,000.00, and prayed judgment for that

sum. One paragraph of the charge to the jury dealt at some length with the question of the measure of damages and contained the statement that if the verdict was for the plaintiff, he should be awarded such an amount of damages, not exceeding $20,000.00 as 'would compensate him for the injury.' An exception was taken to this paragraph, without indicating wherein it was objectionable, and complaint is now made that it erroneously conveyed to the jury an intimation that a finding that the plaintiffs damages amounted to $20,000.00 was justified by the evidence. Looking at the entire paragraph we think it could not have been understood by the jury as conveying such an intimation, and that the words now criticised could only have been understood as marking a limit beyond which the jury could not go. Besides if the defendant entertained any fear that the jury would be misled in that regard, it should in fairness to the court and the plaintiff have called special attention to those words in order that they might be so modified or explained as to leave no doubt of their purpose and meaning."

It is hardly to be believed that the jury were stampeded by the mere mention of the sum of $35,000.00, and proceeded thereupon to disregard both the instructions of the court and the evidence in the case.

It is the common practice, and it is believed proper and necessary, to state in an instruction regarding damages the sum claimed in the declaration which the verdict must not exceed. It is inconceivable that coupled with the definitions of the elements entering into the ascertainment of damage and further with the limitation that such damages should "seem to them just and fair" this mention of the sum of $35,000 should have led the jury to an improper verdict.

But counsel urge that the clause disclaiming any purpose to intimate the sum of $35,000.00, as a criterion receiving judicial sanction, "as to them may seem just and fair," is itself objectionable in that by it, the jury were authorized to find a verdict without reference to the evidence. Here again coun-

sel would put upon language a strange and strained construction. Both words "just" and "fair" are relative and require a determination by reference to a subject matter. That subject matter can only be the evidence. The court in Instruction IV told the jury:

> "The court instructs the jury that all the instructions given, are to be read and considered together in the light of all evidence in the case."

And instruction III in itself throughout relegates the determination of the matters there detailed to the evidence. There is no suggestion anywhere to be found that the jury were to determine any question in the case in any way except by the evidence. Indeed they were sworn to try the case according to the evidence.

The phrase is believed to be altogether usual and it precisely sets forth the true measure of damages in cases of this kind.

In Vicksburg & M. R. Co. *v.* Putnam, 118 U. S. 545, 30 L. Ed. 257, the court said speaking in reference to the use of mortality tables:

> "On the contrary, in the important and much considered case of Phillips *v.* London & S. W. R. above cited (4 Q. B. D. 406; 5 Q. B. D. 78; and 5 C. P. D. 280, S. C. 49 L. J. Q. B. 233) the judges strongly approved the usual practice of instructing the jury in general terms to award *a fair and reasonable compensation,* taking into consideration what the plaintiffs income would probably have been, how long it would have lasted, and all the contingencies, to which it was liable, and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof." (Italics ours).

In St. L. I. M. & S. Co. *v.* Needham, 52 Fed. 371, 3 C. C. A. 129, 146, the court said of an instruction regarding damages:

> "Indeed if after considering all of the evidence they

found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss *according to their own good sense and sound judgment.*" (Italics ours).

Further citation of authority seems unnecessary. The cases cited by counsel for plaintiff in error on page 15, all have to do with the doctrine of proximate cause, which of course must be recognized as applicable here, and which was as fully explained to the jury by Instruction (a) as counsel thought necessary. For they offered no other instruction on the subject.

Counsel intimate that there must be something wrong with this instruction to account for the amount of the verdict. Of course the amount of the verdict is a fact with which this court does not concern itself (St. Louis, I. M. & S. R. Co. *v.* Craft, 237 U. S. 648, 59 L. Ed. 1160). At the same time, it may not be improper to call attention to the fact that there is nothing in the amount of the verdict to show that the jury were guided in arriving at the sum awarded, by any improper motives. The amount is large in one sense, but the injury and pain experienced were most severe and intense. And comparatively the verdict is not startling. See St. Louis, I. M. & S. R. Co. *v.* Craft, supra; Great Northern R. Co. *v.* Otos, U. S. Adv. Ops. 1915, p. 124; Seaboard A. L. R. Co. *v.* Koennecke, U. S. Adv. Ops., p. 126. That inquiry was of course most pertinent in the Court of Appeals and was greatly relied on by counsel. But Judge Cardwell summarizes the evidence thus:

"The injuries sustained by the plaintiff were very severe, and the circumstances connected with the accident and his attendant sufferings were in the highest degree distressing; or, as he, after describing his situation as being caught from his knee down, jammed against the boilerhead for fifty minutes and his leg roasting, on being asked as to his suffering, said 'there is no way to get at that.' Amputation of his leg above the knee,

leaving a stump of about eight or ten inches, followed. To the time of the trial, one year after the injury, the wound had not entirely healed. He had attempted to use an artificial limb but found that impossible, and not only was he thus crippled, but his nervous system was affected so that at times he still suffered pain and could not rest, all of which facts were in a quiet way related by the plaintiff to the jury, the stump of his leg exposed to them that the unhealed wound might be observed by the jurymen.

"The plaintiff was at the time of his injury thirty-two years old, was in the best of health, a man of unusual physique, who could stand the severest sort of labor and perform the arduous duties of a fireman on an engine, as well as and above the average man of his age. He had been in the employ of the defendant as a fireman six and one-half years, both in freight and passenger service, earning at the time of this injury about $100.00 per month, and after the injury and up to the trial of this case he had been unable to earn anything or do anything, as he had no other profession or trade than that he was pursuing when injured."

It is submitted therefore that the instruction criticised, accurately and precisely pointed out to the jury the elements of damage applicable to this case, that both by its terms and by the other instructions with which it must be read, the jury were fully and emphatically confined to the evidence and warned against entering upon regions of speculation and conjecture; that in finding their verdict they were and could be guided by no other matters than the true estimate of damages in such cases.

Respectfully submitted,

C. W. ALLEN,
H. W. WALSH,
Attorneys for Asa P. Carnahan, Defendant in Error.

March 31, 1916.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JUNE 1, 1915.

(24,757)

(24,757)

SUPREME COURT OF THE UNITED STATES

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a COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 26th Day of March, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from the Warren Circuit Court.

Be it remembered that heretofore, to-wit, on the 8th. day of December, 1914, the appellant by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in the above styled case, the part of which as ordered to be copied by appellant's præcipe filed herein and by the Præcipe and Supplemental Præcipe of appellee is in words and figures following, to-wit:

1 Be it remembered that the following, with the bill of evidence attached, is a true, correct and complete transcript of the entire record of the case late pending in the Warren Circuit Court wherein William H. Stewart's administratrix, Jeanette Stewart, was plaintiff, and the Louisville & Nashville Railroad Company was defendant.

Pleas Before the Hon. McKenzie Moss, Judge Presiding.

The following is a copy of the petition filed in open Court on the 30th. day of July, 1910:

Warren Circuit Court, October Term, 1910.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART,
Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

This plaintiff, Jeanette Stewart, says that she is the duly qualified and acting administratrix of William H. Stewart, deceased, who was her husband. She says she was appointed same by order of the Warren County Court, October 10, 1908, and took the oath and executed the bond required by law, and as such she prosecutes this suit. She says that the Louisville & Nashville Railroad Company

is a corporation and common carrier, created by an act of the Legislature of Kentucky, with power to sue and be sued under the corporate name used in the caption. She says further that the
2 defendant is now and has been for many years last past operating extensive lines of railroad and engaged in commerce between the States of Kentucky and Tennessee, and other states, carrying freight and passengers over its said lines through the State of Kentucky into Tennessee and other states, and doing a general inter-state business and commerce as a common carrier. She says further that defendant has now, and has maintained for many years past an office and agent at Bowling Green, Kentucky, in which City her said husband resided at the time of his death, and this plaintiff now resides in said City. She says further that on the 5th. day of September, 1908, her said husband was employed by defendant as an engineman upon one of its freight trains, and employed in the inter-state traffic and commerce aforesaid, running from Bowling Green, Kentucky, to Paris in the State of Tennessee and while so employed in discharge of his duty as engineman, in said State, at Cumberland City, and without fault or negligence upon his part he was injured by the gross negligence of defendant and its agents, and employes, and as a direct and proximate result of said injury, her said intestate died in the City of Bowling Green twenty seven days after such injury and his services were thereby lost to his estate and this plaintiff to their damage and injury in the sum of $15,000.00.

She says that at the time of his death decedent had for wife this plaintiff, and three minor children, James Theodore, a son, now six years old, William Albert, another son, now four years old, and Christine Rebecca, a daughter, one year old, all of whom were dependent upon said decedent for support, and that her said husband was at the time of his injury receiving for his services and
3 earning $160.00 per month, and was in good health, thirty four years of age, and his expectancy of life was 31.68 years.

She says further that at the time of the death of her said decedent, under the statute law of the State of Tennessee, then in force, a right of action for his injuries survived for the benefit of this plaintiff, his widow, and his said infants, and says further that a cause of action also survives and was created for their use and benefit under an act of Congress, approved April 22, 1908, entitled: "An act relating to the liability of common carriers by railroad to their employees, in certain cases." The first and sixth sections of said act are respectively as follows:

"Sec. 1. Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, that every common carrier by railroad, while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death

of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier,
4 or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, beats, wharves or other equipment.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day *of* the cause of action accrued."

She says that she pleads and relies upon the provisions of said act and says that as a direct result of the injury aforesaid, she, as plaintiff and widow, and her infant children and her husband's estate have been damaged in the sum of $15,000.00, which she should recover of defendant.

Wherefore, the premises considered, plaintiff prays judgment against defendant for fifteen thousand dollars, her costs and for all proper relief.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 5 day of September, 1910:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
v.
L. & N. R. R. Co., Defendant.

Order.

This day came the plaintiff and filed in office, pursuant to the Code of Practice in such cases provided, an amended petition.

The following is a copy of the amended petition filed in office on rule day, 5 day of September, 1910:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

5 *Amended Petition.*

This plaintiff, for amendment herein, says that there is but one cause of action in her petition, and she claims and so intended the

benefit of the Federal Statute known as the employee's Liability Act.

Wherefore she prays as heretofore.

B. F. PROCTER,
Attorney for W. H. Stewart's Adm'r'x, &c.

The following is a copy of an order entered in office on rule day, the 5 day of September, 1910:

Warren Circuit Court.

W. H. STEVENS' ADM'R'X, &c.,
vs.
L. & N. R. R. Co.

Order.

Came the defendant and moved the Court to require plaintiff to elect whether he will proceed in this case under the Tennessee law or statutes or under the Federal Statute referred to or set out in his petition and to strike from the petition all allegations with reference to any law other than the one under which he elects to proceed.

The following is a copy of an order entered in open court on the 17 day of October, 1910:

Warren Circuit Court.

W. H. STEVENS' ADM'R'X, &c.,
v.
L. & N. R. R. Co.

Order.

6 Came the defendant and moved the Court to strike out of the petition herein certain parts as indicated in the motion filed.

The following is a copy of the motion filed in open Court on the 17th day of October, 1910:

Warren Circuit Court.

STEWART ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

The plaintiff, having filed an amended petition herein electing to proceed under the Act of Congress approved April 22nd, 1908,

entitled an Act relating to the liability of common carriers by railroad to their employes in certain cases, and commonly known as the Employers' Liability Act. Now comes this defendant and moves to strike out of plaintiff's petition the following words, to-wit:

"She says further that at the time of the death of her decedent under the statute law of the State of Tennessee, then in force, a right of action for his injuries survives for the benefit of this plaintiff, his widow, and his said infants."

And upon this motion this defendant prays the judgment of the Court.

SIMS & RODES,
Att'ys for Def'ts.

7 The following is a copy of an order entered in open Court on the 12th day of November, 1910.

Warren Circuit Court, October Term, 1910.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause having been submitted upon defendant's motion to strike out certain parts of plaintiff's petition and by consent of plaintiff in open Court, it is now ordered that said motion be and is hereby sustained and that the following words in plaintiff's petition, to wit:

"She says further that at the time of the death of her decedent, under the statute law of the State of Tennessee, then in force, a right of action for his injury survived for the benefit of this plaintiff, his widow, and his said infants."

be and is hereby stricken out of said petition.

Therefore came defendant and filed demurrer and this cause is submitted on said demurrer.

The following is a copy of the demurrer filed in open Court on the 12th day of November, 1910:

Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

8 *Demurrer to Petition.*

The defendant demurs to plaintiff's petition herein, because the act of Congress upon the provisions of which this alleged cause of action is based, is unconstitutional and void:

1. Because Congress has no power under Article 1, Section 8 of the Constitution of the United States to enact said statute;

2. Because the statute assumes to govern the relation of master and servant as between an interstate carrier and interstate employe;

3. Because the statute is not in any sense a regulation of commerce among the several states;

4. Because the statute provides a remedy only to an injured employe and, therefore, is in no sense an Act to regulate Commerce;

5. Because by the terms of the statute defendant would be made liable by reason of the negligence of an intrastate employe;

6. Because Congress is prohibited, by the Fifth Article or Amendments to the Constitution of the United States, from depriving any person, of life, liberty or property without due process of law;

7. Because the statute violates the true intent of said Fifth Article of Amendments to the Constitution;

8. Because the statute is partial in its operation and not founded upon a reasonable or just classification;

9. Because the statute is not limited in its operation to such classes of employees, as, if Congress has the power to legislate at all upon the subject, might reasonably and rightfully be embraced within the terms of such a statute;

10. Because Congress has no power to provide a remedy to an injured employe of an interstate carrier as provided in section 3 of said statute;

9 11. Because Congress has no right, as it attempted to do in section 5 of the statute, to prohibit the making of a contract of employment which releases in advance actions for negligence, as such a prohibition would deprive both employer and employe of the valuable and inalienable right of liberty of contract contrary to the Fifth Article of Amendments to the Constitution of the United States (Adair v. United States, 208 U. S. 161).

Defendant demurs further upon the ground that even if the statute under which this action is brought is constitutional, it is not available to plaintiff in this case for the reason that Congress did not intend by said Act of April 22, 1908, to authorize the institution of an action under it in the Courts of the States, but only in the Federal Courts, and (2) Congress has not the power to make it incumbent on the Courts of the States to assume jurisdiction of such an action.

Defendant further demurs to plaintiff's petition herein because the same does not state facts sufficient to constitute a cause of action against this defendant.

SIMS & RODES,
Att'ys for Def't.

The following is a copy of an order entered in open Court on the 3 day of January, 1911:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, &c.,
vs.
L. & N. R. R. Co.

Order.

This cause having been submitted on demurrer of defendant to the petition and the Court being advised, adjudges and orders that said demurrer be and the same is overruled, the Court being of the opinion and so adjudging that the Act of Congress, approved April 22, 1908, entitled "An Act relating to the liability of Common Carriers by Railroad to their employees in certain cases" is constitutional and valid and this Court has jurisdiction of this action. To all of the above rulings of this Court defendant excepts.

The following is a copy of an order entered in open Court on the 20th day of January, 1911:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
L. & N. R. R. Co.

Order.

Comes defendant and moves the Court to require plaintiff to make the petition more specific, and this cause being submitted on said motion and the Court being advised, it is adjudged that the same be and it is hereby sustained, to which ruling of the Court plaintiff objects and excepts.

The following is a copy of the motion entered in open Court on the 20 day of January, 1911:

Warren Circuit Court.

WM. H. STEWART'S ADMINISTRATRIX, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Make Petition More Specific.

Comes defendant, and without waiving its demurrer to the petition, moves the Court to require plaintiff to make her petition more definite and certain, so as to allege by what act or acts of gross

negligence of defendant, its agents and employes, plaintiff claims her decedent, Wm. H. Stewart was injured at the time complained of in the petition.

SIMS & RODES,
Attorneys for Defendant.

11 The following is a copy of an order entered in open Court on the 11 day of November, 1911:

Warren Circuit Court.

W. H. STEWART'S ADMINISTRATRIX
v.
L. & N. R. R. Co.

Order.

This cause having been submitted on motion of defendant to require plaintiff to make his petition more specific and definite as to the act or acts constituting the negligence alleged in the petition and the Court being advised, adjudges that the said motion be and the same is sustained and plaintiff is required to set out the specific acts of negligence referred to in her petition, to all of which ruling the plaintiff objects and excepts.

The following is a copy of an order entered in open Court on the 26th day of January, 1912:

Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART,
Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the plaintiff and filed an amended petition to conform to the order and to make her petition more specific.

The following is a copy of the amended petition filed in open Court on the 26 day of January, 1912:

12 Warren Circuit Court.

WILLIAM H. STEWART'S ADMINISTRATRIX, JEANETTE STEWART, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition.

The plaintiff comes and amends her petition herein to conform to the order and make it more specific says that at the time of his injury her intestate and husband was in the cab of his engine, and defendant and its agents and servants did with negligence so operate and manage the engine and train upon which he was serving as to throw, or cause him to fall against the side of the cab or engine, and injure him that he died as the result of said negligence, and this is the injury and negligence for which she sues.

Wherefore she prays as heretofore.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 1 day of April, 1912:

Warren Circuit Court, April Term, 1912.

W. H. STEVENS' ADM'R'X, &c.,
v.
THE L. & N. R. R. CO.

Order.

This day came the plaintiff in open Court and moved to file of record an amendment filed on March 27, 1912, in office, upon accepted notice, which motion is filed as part of this record,
13 and defendant objected to the filing, it is now ordered that the motion be submitted.

The notice mentioned above is not found in the papers.

The following is a copy of the amended petition filed in open Court on the 1 day of April, 1912:

Warren Circuit Court, April Term, 1912.

W. H. STEWART'S ADM'R'X, &c., Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition No. 3.

This plaintiff comes and amends her petition hereinbefore — answer, and to conform to the proof and says that her said husband was

sober, industrious, moral and a skilled engineer, and devoted to his said infant children, and his services in their training, instruction, care and attention were of the highest value and all of which was lost to them as well as his wages named in the original petition by the same negligence alleged heretofore whereby the said infants and this plaintiff were damaged in the sum of thirty-five thousand dollars, which sum they should recover of defendant.

Wherefore she prays for thirty-five thousand dollars, her costs and all proper relief.

B. F. PROCTER,
Attorney for Plaintiff.

The following is a copy of an order entered in open Court on the 3rd day of April, 1912:

Warren Circuit Court, April Term, 1912.

14 W. H. STEWART'S ADM'R'X, Plaintiff,
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause coming on for trial on motion of plaintiff to file an amended petition, of record, heretofore filed in the Clerk's office, and the Court being advised, it is adjudged that said motion be sustained, and said amendment is hereby filed. To all of which defendant excepts.

The following is a copy of an order entered in open Court on the 5th day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause having been submitted on defendant's motion to require the plaintiff to make her petition more specific, filed on January 20th, 1911, *and* the Court being advised, sustained said motion and ordered that plaintiff make her petition more specific by setting out by what acts of negligence the alleged injuries occurred as set out in the petition, to all of which plaintiff excepted. Thereupon the plaintiff, having on January 26th, 1912, filed her amended petition in alleged compliance with said order, the defendant objected and insisted upon its former motion and the Court being advised overruled its objection and its said motion to make more specific as

applied to said petition and amended petition, to all of which the defendant excepted at the time. Thereupon came the defendant and filed its motion to strike out from the plaintiff's petition
15 certain words as set out therein, to which the plaintiff objected, and this cause is now submitted on said motion to strike out.

The following is a copy of the motion entered in open Court on the 5 day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Strike from Petition.

Comes the defendant, and not waiving its demurrer, its motion to make more certain, and its motion to elect, *and* moves the Court to strike from the petition the following words, to-wit: "And his services were thereby lost to his estate"; also the words: "She says that at the time of his death decedent had for wife this plaintiff, and three minor children, James Theodore, a son now six years old, William Albert, another son, now four years old, and Christine Rebecca, a daughter, one year old, all of whom were dependent upon said decedent for support"; also the following words: "And her husband's estate", where they occur in the following sentence: "And says that as a direct result of the injury aforesaid, she as plaintiff and widow, and her infant children and her husband's estate have been damaged; etc.

SIMS & RODES,
Attorneys for Defendant.

16 The following is a copy of an order entered in open Court on the 5 day of April, 1912:

Warren Circuit Court, April Term 1912.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This cause being submitted for judgment upon Defendant's motion to strike out parts of the petition and the Court being advised it is adjudged that the motion be overruled, to which Defendant excepts.

The following is a copy of an order entered in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the defendant and filed its motion to strike out — of plaintiff's petition number 3, and this cause being submitted upon said motion, *and* the Court being advised adjudges and orders that the same be and the same is hereby overruled, to which the defendants excepts. Thereupon came the defendant and filed its general demurrer herein to plaintiff's petition as amended, and this cause was submitted upon said general demurrer and the Court being advised orders and adjudges that said demurrer be and the same is hereby overruled, to which defendant excepts. Thereupon came defendant and tendered its answer herein, to the filing of which
17 Plaintiff objected and excepted; and Plaintiff moved the Court to adjudge the allegations of the petition to be taken as confessed, and the court overruled said motion to which Plaintiff excepts; and the Court further overruled Plaintiff's objection to the filing of answer herein, and orders same to be and it is hereby filed, to which Plaintiff excepts.

The following is a copy of demurrer filed in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

General Demurrer.

Comes the defendant, Louisville & Nashville Railroad Company, and without waiving its special demurrer hereinbefore filed and its motion to make more specific and definite and to strike out and its objections to plaintiff's amended pleadings filed, now demurs generally to the plaintiff's petition as amended because it says the said petition as amended does not state facts sufficient in law to constitute any cause of action against defendant; and upon this it prays the judgment of the court.

SIMS & RODES, *Att'ys.*

The following is a copy of a motion filed in open Court on the 9th. day of April, 1912:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

Comes the defendant and without waiving any of its former motions herein or objections, *and* moves the court to strike from plaintiff's amended petition number 3 the following words, to-wit:
18 "That her said husband was sober, industrious, moral and a skilled engineer, and devoted to his said children and his services in their training, instruction, care and attention were of the highest value and all of which was lost to them, as well as his wages named in the original petition by the same negligence alleged heretofore".

And upon this motion it prays the judgment of the court.

SIMS & RODES, *Att'ys.*

The following is a copy of Answer filed in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

Comes the defendant and without waiving its demurrer and its motions to require plaintiff to elect, to make her petition more definite and certain, and to strike from her petition and without waiving its objections to plaintiff's filing her two last amended petitions herein, and for answer to so much of plaintiff's petition as it is advised it is necessary to answer, it says: That it has no knowledge or information sufficient to form a belief and therefore denies that Jeanette Stewart, named in the petition herein, was appointed as administratrix of the estate of William H. Stewart by order of the Warren County Court on October 1st. 1906, or at any time, or that she took the oath or executed the bond required by law or that she is the duly qualified or acting administratrix of William H. Stewart,
19 deceased.

Defendant denies that said decedent was, without fault or negligence on his part, injured by the gross or any negligence of defendant or its agents or employees or at the time or place mentioned in the petition or at any other time or place; and denies that defendant or its agents or employees were negligent at all. Defendant denies that as the direct or prominate result of the injury alleged in the petition said William H Stewart died 27 days after

said alleged injury or at any other time. Defendant denies that plaintiff has been damaged or that she should recover $15,000 or any other sum as a result of decedent's alleged injury or death. Defendant denies that decedent was earning $160 per month or that he was in good health at the time of his alleged injury. Defendant denies that as a direct result of the alleged injury, plaintiff or her infant children or her husband's estate have any of them been damaged in the sum of $15,000 or in any sum, or that plaintiff should recover any sum of defendant. For further answer defendant says that the Act of Congress approved April 22, 1908, attempted to be relied on by plaintiff in her petition is not applicable to the facts of the case, and that the plaintiff is not entitled to recover in this action by reason of said statute or otherwise.

Further answering the 2nd. amended petition defendant denies that at the time of the alleged injury of plaintiff's intestate, her husband was in the cab of his engine or that defendant or its agents or servants did, with negligence, or at all so operate or manage the engine or train upon which said William H. Stewart was serving as to throw or cause him to fall against the side of the cab or engine or to injure him, and denies that he was thrown or caused to fall against the side of the cab or engine or elsewhere or injured or that defendant or its agents or servants were negligent in any wise; denies that said Stewart died as the result of said alleged negligence or at all or that this is the alleged injury or negligence for which the plaintiff sues.

Further answering plaintiff's amended petition number 3 the defendant says it has no knowledge or information sufficient to form a belief and therefore, denies that her said husband was sober or industrious or moral or a skilled engineer or devoted to his infant children; and denies that his services in their training or instruction or care or attention were of the highest value or any value and it has no knowledge or information sufficient to form a belief and therefore denies that he gave said children training or instruction or care or attention or that all of same was lost to them or that his wages were lost to them by the same or any negligence as set out in the petition or at all, and denies that thereby or at all the said infants or plaintiff were damaged in the sum of $35,000 or in any sum or that they should recover any sum of defendant.

Paragraph No. 2. Further answering defendant states that the plaintiff's intestate at the time and place referred to in the petition, and at the time and place of his alleged injury, if he was injured, which it denies, was himself negligent and his own negligence and want of ordinary care for his own safety contributed to produce said alleged injury to such an extent that but for same it would not have occurred; and defendant pleads the contributory negligence of said W. H. Stewart in diminution of the alleged damages herein.

Wherefore defendant prays that the plaintiff's petition be dismissed, for its costs and all proper and general relief.

SIMS & RODES, *Att'ys.*

The following is a copy of an order entered in open Court on the 9th. day of April, 1912.

Warren Circuit Court.

21 WM. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Came defendant by attorneys and filed exceptions to the depositions of plaintiff and plaintiff also filed reply herein.

The following is a copy of exception filed in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Exceptions to Depositions.

Comes the defendant on this day and in advance of the trial of this case and excepts to the depositions of W. C. Minor, O. L. Hill, H. T. Jones and T. A. Sorrels upon the following grounds, to-wit:

It states that said Minor, Jones, Hill and Sorrells are each of them present in court just before the trial of this case and will be present during the trial of this case and sworn to testify as witnesses therein, and that each of them will be produced and offered as witnesses upon the hearing of the case before the jury. Defendant states further that said Jones and said Minor reside in Bowling Green, Kentucky, as does also said Sorrells.

Defendant objects and excepts to each of said depositions and to the reading of same or any part thereof before the jury and upon this it prays the judgment of the court.

SIMS & RODES.

The following is a copy of reply filed in open court on the 9th. day of April, 1912:

22 Warren Circuit Court, April Term, 1912.

W. H. STEWART'S ADMINISTRATRIX, &c., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply.

For reply to so much of Defendant's answer as plaintiff is advised is material Plaintiff denies that the act of Congress named in the pleading is not applicable to the facts of this case and denies that she is not entitled to recover under said statute.

For reply to paragraph 2, Plaintiff denies that her intestate was himself negligent in any way and denies that by his own alleged negligence or want or ordinary care for his own safety he contributed to produce said injury to any extent or at all and denies Defendant's right to plead his alleged contributory negligence in diminution of damages.

Wherefore she prays as heretofore and for all proper relief.

B. F. PROCTER,
Att'y for Plaintiff.

23 The following is a copy of an order entered in open court on the 9th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Came plaintiff by att'y, and the issue being joined thereupon came the following jury: Brown Glenn, Leslie Kelley, W. C. Cooksey, Samuel Young, P. E. Eadens, C. W. Rogers, Jno. T. Doolan, C. F. Cox, S. M. Lay, Jack Barber, J. H. Kingston and Elzy Garrett, who were sworn to well and truly try the issue and a true verdict render and on motion of defendant, ordered that the Official stenographer make full and complete shorthand notes of all the testimony had and heard upon the trial of this case and after hearing part of the testimony, it appeared that there will not be time to complete the trial on today the jury was permitted to separate until tomorrow morning at 9 o'clock under the usual instructions and admonitions of the court not to speak to any one or permit any one to speak to them concerning this case.

The following is a copy of an order entered in open court on the 10th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S —
vs.
LOUISVILLE & NASHVILLE —.

24 *Order.*

Again came parties by Attorneys and the jury sworn in on yesterday and at the conclusion of Plaintiff's testimony, defendant moved the Court for a peremptory instruction and the Court being advised, said motion is overruled to which defendant excepts. Thereupon came defendant and tendered an amended answer herein and entered its motion to file same, to which plaintiff excepts and the Court being advised on said motion the same overruled, to which ruling defendant excepts. There not being time to complete the trial on today the jury was permitted to separate until tomorrow morning at 9 o'clock under the usual instructions and admonitions of the Court not to speak to any one or permit any one to speak to them concerning the case.

The following is a copy of an order entered in open court on the 11th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

Again came parties by Attorneys and the jury *being* sworn herein on a former day and after hearing the remainder of the testimony, instructions of the court and arguments of counsel retired to their room to consider of their verdict and afterward returned into open court the following verdict, to-wit:

"We the jury find for plaintiff to the amount of $20,000.

S. M. YOUNG, *Foreman.*

It is therefore adjudged by the court that the plaintiff, Jeanette Stewart, Administratrix of the estate of Wm. H. Stewart, recover of the defendant, Louisville & Nashville Railroad Company, a corporation, the sum of $20,000 and her costs herein expended.

The following is a copy of an order entered in open court on the 13th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
VS.
LOUISVILLE & NASHVILLE RAILROAD CO.

Order.

Came defendant by attorneys and filed motion and grounds for a new trial herein.

The following is a copy of the motion and grounds for a new trial filed in open court on the 13th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
VS.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion and Grounds for New Trial.

Comes the defendant, Louisville & Nashville Railroad Company, and moves the court to set aside the verdict of the jury herein and to grant to the defendant a new trial upon the following grounds, to-wit:

26 (1) Because the damages given by the jury in their verdict are excessive and appear to have been given under the influence of passion or prejudice:

(2) Because the verdict is not sustained by sufficient evidence and is contrary to law.

(3) Because the court erred in refusing on motion of defendant and at the conclusion of plaintiff's testimony, to peremptorily instruct the jury to find a verdict for the defendant.

(4) Because the court erred in giving to the jury instructions Nos. 1, 2, 3, 5, 6 and each of them.

(5) Because the court erred in refusing to give to the jury instruction marked "A," offered in behalf of and by defendant.

(6) Because the court erred in admitting over the objection of defendant incompetent evidence to the jury and because the court erred in the exclusion of competent testimony offered by defendant, all to the prejudice of the defendant.

(7) Because there was no proof in the case of the plaintiff's appointment or qualification as administratrix of the estate of Wm. H. Stewart, deceased, and no proof that she was acting as such.

(8) Because the court erred in the admission of testimony, over the objection of defendant, upon the trial, that the plaintiff had an afflicted child, the child of the decedent, W. H. Stewart, and because of the misconduct of counsel of the plaintiff in his argument in refer-

ring to such testimony and speaking of such child as an "imbecile," whereas in said testimony referred to, he had been called an "afflicted child," all of which was to the prejudice of the defendant.

27 (9) Because the court erred in overruling the defendant's motion at the conclusion of plaintiff's testimony to file an amended answer, which, by order of court, was made a part of the record, but not filed.

(10) Because of misconduct of counsel for plaintiff in his argument to the jury in referring to and reading to the jury from plaintiff's book of rules rule No. 104 which had never been introduced in evidence or read to the jury upon the trial of the case.

(11) Because the court erred in giving to the jury instructions No-. 1, 2, 3, and 5 all and each of which are not in conformity to but in violation of the terms and provisions of the Act of Congress of April 22, 1908, commonly known as the Eemployers' Liability Act; and further erred in permitting testimony to be heard by the jury over defendant's objection as to the condition, situation and ages of the intestate's children, for the purpose of magnifying the damages sued for, in violation of the terms and provisions of said Act of Congress of April 22, 1908; because the court erred further in overruling the defendant's motion to require the plaintiff to make her petition more specific and definite and to set out what act or acts of negligence were complained of and the bases of the damages sued for, as required by the usages and practices and rules prevailing in the Federal Courts of the United States, and in conformity to the terms and provisions of said Act of Congress of April 22, 1908; and because the court erred in overruling the defendant's motion at the conclusion of plaintiff's testimony and of all testimony, to peremptorily instruct the jury to find a verdict for the defendant,

28 because under such evidence no right of action existed against the defendant according to the terms and provisions of the said Act of April 22, 1908.

Defendant states further that by reason of such errors above complained of the defendant has been deprived of the benefit of those provisions of the Constitution of the United States set out in Articles 5 and 14 of the Amendments to said Constitution; it has thereby been deprived of property without due process of law in violation of article 5 of said amendment, and it has been further deprived of property without due process of law and denied the equal protection of the laws in violation of Article 14, Section 1 of said Amendment to the Constitution of the United States.

(12) Because the alleged verdict returned by the jury is not a proper or valid verdict because the same is indefinite and uncertain in meaning and not in any form required by law or the instructions of the court.

Wherefore, defendant prays for a new trial and all proper relief.

SIMS & RODES.

The following is a copy of an order entered in open court on the 22nd. day of April, 1902:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came plaintiff and tendered in open court and asked to file the affidavit of plaintiff and exhibits named therein as evidence on motion for a new trial to which defendant objected.

29 The following is a copy of an order entered in open court on the 27th. day of April, 1912:

Warren Circuit Court, April Term.

W. H. STEWART'S ADM'R'X, Pl'ff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came plaintiff, and filed an affidavit of Mrs. W. H. Stewart on motion for a new trial, and it is ordered that her affidavit tendered on a former day with depositions of Samuel Minor, Hill and Jones be also filed as part of this case to which defendant objects, and excepts.

Defendant also tendered the affidavit of Jno. B. Rodes and J. C. Sims which the court ordered filed, and to which plaintiff objects and excepts, and thereupon the motion for a new trial was submitted for judgment.

The following is a copy of affidavit filed in open court on the 25th. day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Affidavit.

This affiant Mrs. W. H. Stewart says that her little child that Dr. Stone testified was afflicted was only in the court room twice during the trial of her cause at April Term, 1912, and that was for a few minutes the evening before the verdict and the next morning during

the argument of her counsel, and that she then held the child in her lap, at the side of the table furthest from the jury used by counsel.

30 That there is nothing peculiar in the appearance of this child except her eyes, which have not a look of intelligence usual to bright children. She says that in fact her child is an imbecile, so far as talking goes, that it could not walk for three years, and now can only say "mamma" and "Papa."

Sworn to before me by Mrs. W. H. Stewart over the telephone, April 25th, 1912.

O. A. ROUP, *C. W. C. C.*

The following is a copy of affidavit filed in open court on the 25th day of April, 1912.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Pl'ff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Def't.

Affidavit.

Affiants, Jno. B. Rodes, and J. C. Sims, state that they were attorneys for the defendant, Louisville & Nashville Railroad Company, conducting the trial of the above styled cause at the April term of the Warren Circuit Court, and that they were present during the argument of B. F. Procter, attorney for the plaintiff; that during the trial the court had permitted over the objection of defendant's counsel Dr. T. W. Stone to refer to one of the children of Mrs. W. H. Stewart as an afflicted child; that during the argument of the case Mrs. Stewart sat with the afflicted or imbecile child about four years of age, upon her lap and about 20 feet from the jury; that when Mr. B. F. Procter arose to speak, the said Mrs. Stewart arose with her chair and moved up so that she sat by the side or immediately in the rear of Mr. Procter as he was speaking; that when he was speaking he referred to the child pointing to it, in the presence of the jury, as an imbecile; that at the time, counsel for defendant objected in the presence of the jury, and the court did say to the jury that they could in this

31 case only find damages to the estate of W. H. Stewart; that Mrs. Stewart, with the imbecile child in her lap, continued to sit during the entire argument of her counsel at the side or immediately in the rear of said counsel, and in near proximity to the jury; that said imbecile child showed upon its face and by its action that it was an afflicted child; that said imbecile child together with two other children of plaintiff, had been in the court room the greater part of the entire trial of this case.

JAS. C. SIMS.
JNO. B. RODES.

Subscribed and sworn to before me by J. C. Sims and Jno. B. Rodes, this April 24, 1912.

O. P. ROPER,
Examiner Warren County.

The following is a copy of an order entered in open court on the 27th day of April, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This cause having been submitted on Defendant's motion for a new trial, adjudges and orders that said motion be and is overruled, to which ruling the defendant excepts and prays an appeal to the Court of Appeals of Ky. which is granted; and defendant is given by consent of parties until and including the 10th. day of the next civil term of this Court to be held in October 1912, to tender a bill of exceptions herein, together with the official stenographer's transcript of the testimony upon the trial of this cause, which she is now ordered to make and file or lodge with the papers of the case.

32 The following is a copy of an order entered in open court on the 21st. day of October, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

On this day came the defendant, the Louisville & Nashville Railroad Company, and tendered its bill of exceptions herein, together with the official stenographer's transcript of the testimony its carbon thereof, identified and marked with the letter "X", and moved that each and all of same be filed and the court took the same under advisement and upon consideration directing that the same be marked tendered and offered to be filed on this day.

The following is a copy of an order entered in open court on the 8th. day of November, 1912:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

The defendant having on the first day of this term of court, to-wit, October 21, 1912, appeared in court and tendered its bill of exceptions

herein, together with the official stenographer's transcript of the evidence identified and marked "X", and the same having been taken under advisement, and examined and approved by the Judge, it is now ordered that said bill of exceptions and transcript of said testimony be and they are now filed and made a part of the record without being spread on the Order Book.

33 The following is a copy of the bill of exceptions tendered and offered to be filed October 21, 1912, and filed in open court on the 8th. day of November, 1912.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered that on the trial of this case at the June term 1912, of the Warren Circuit Court before the Honorable McKenzie Moss, Judge, and the jury, the evidence was taken by Mrs. Belle Galloway, Official Stenogarpher of this Court, and her transcript of the evidence, together with exceptions and objections therein both as to the competency of witnesses and testimony certified to by her and approved by the Judge of the Court, is made a part of this bill of exceptions the same as if copied in full herein. Said transcript of evidence contains all the evidence given on the trial of this action, together with all exceptions made thereto, rulings had and exceptions taken, and the same is filed herewith in duplicate as part hereof and for identification Marked "X". Said transcript marked "X" for identification contains all the evidence introduced and heard and offered to be introduced and refused as well as papers and exhibits offered and used as evidence on the trial of the above styled cause.

34 Be it further remembered that at the conclusion of plaintiff's testimony and at the conclusion of all the testimony the defendant moved the court to instruct the jury peremptorily to return a verdict for the defendant, which motions the court overruled, to which rulings the defendant excepted at the time and still excepts.

Be it further remembered that at the conclusion of all the testimony in the case the plaintiff, moved the court to give to the jury instructions B. C. D. and E., which are as follows, to-wit:

Instruction "B."

The court instructs the jury that if they believe from the evidence that on the occasion in controversy the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate, W.

H. Stewart, was serving as an engineer, so as to cause him to fall against the cab or engine and that he died as a natural and proximate result of said negligence, they shall find for plaintiff such a sum as will fairly compensate the surviving widow and his three infant children for his death, if it occurred wholly or in part from the negligence of any of the servants or agents of defendant as aforesaid, not to exceed the sum of Thirty-five Thousand Dollars.

Instruction "C."

The court further instructs the jury that if they believe from the evidence that plaintiff should recover for the negligence of defendant's agents and servants as set out in instruction No. 1, if any, and further believe from the evidence that said Stewart was himself negligent, and but for his own contributory negligence he would not have been hurt, then the jury may reduce the amount of plaintiff's recovery in proportion to the amount of negligence attributable to said Stewart.

Instruction "D."

The court further instructs the jury that if they believe from the evidence that an emergency existed, but the use of the emergency application was not necessary nor believed to be necessary by the flagman in the exercise of a reasonable judgment in the prudent and careful operation of the train for the purpose of preventing an injury to the property of defendant they should find for plaintiff as set out in instruction No. 1.

Instruction "E."

The court further instructs the jury that plaintiff's intestate in entering the services of defendant assumed only such risks as are usual and necessary in the prudent and careful operation of the train, and unless they believe from the evidence that defendant's agents and servants were managing said train prudently and carefully at the time the emergency was applied, or if they believe from the evidence that there would have been no necessity for the use of the emergency but for the preceding negligence, if any, of defendant's agents or any of them, they should find for plaintiff as set out in instruction No. 1.

The defendant objected to the giving of these instructions and each of them and its objection was sustained and said instructions and each of them were refused. To the refusal of the court to give said instructions and each of them the plaintiff excepted at the time.

At the same time the defendant moved the court to give to the jury instruction marked "A", which is as follows, to-wit:

Instruction "A."

The court instructs the court that when the plaintiff's intestate, William H. Stewart, entered the service of the defendant Railroad

Company as engineer upon the train mentioned in the pleadings, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believed from the evidence that flagman O. L. Hill stopped the train upon which said Stewart was serving as engineer by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment it was necessary so to do in order to preserve property from injury or damage; and further believe that such stoppage of said train naturally and proximately resulted in the injuries to said Stewart, if any, complained of in the petition,—then the law is for the defendant and the jury shall find for the defendant.

The plaintiff objected to the giving of this instruction and her objection was sustained and said instruction refused. To the refusal of the court to give said instruction the defendant at the time excepted and still excepts.

Be it further remembered that at the conclusion of all the testimony the court on its own motion gave to the jury instructions Nos. 1, 2, 3, 4, 5, 6, and 7, which are as follows, to-wit:

Instruction No. 1.

The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause
37 him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death, if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to-wit: $35,000.

Instruction No. 2.

The court instructs the jury that under the rules of defendant's Company, it was the duty of the flagman, O. L. Hill to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff.

Instruction No. 3.

The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money, the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money.

38 Instruction No. 4.

The court instructs the jury that in the operation of defendant's train it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to prejudice the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.

Instruction No. 5.

The instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believe that said stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for defendant and the jury shall so find, unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants in the negligent operation of said train prior to the application of said brakes in which event they will find for plaintiff.

Instruction No. 6.

39 The court further instructs the jury that by negligence as used in the instruction is meant the failure to use such care as a person of ordinary prudence would exercise under the same or similar circumstances.

Instruction No. 7.

Nine of the jury may find a verdict but if less than the entire jury agree then those who do agree must sign the verdict.

To the giving of each of these numbered instructions the defendant and the plaintiff both excepted at the time and defendant still excepts.

The above instructions as set out herein are all the instructions that were offered, given or refused on the trial of this case.

Be it further remembered that in the course of the argument before the jury made by B. F. Procter, counsel for the plaintiff, he pointed and referred to a little child of the plaintiff sitting in the lap of the plaintiff and in the immediate presence of the jury, as an afflicted and imbecile child; that at the time defendant by counsel objected in the presence of the jury, and the Court said to the jury that they could find damages only to the estate of W. H. Stewart, to all of which defendant excepted at the time and still excepts.

Be it remembered that at the conclusion of plaintiff's testimony, to-wit, on April 11, 1912, the defendant offered and moved the court to file an amended answer, to which the plaintiff objected and the court sustained said objection and overruled defendant's motion and declined to file said amended answer; to which ruling of the court defendant excepted at the time and still excepts. Said amended answer is attached hereto as part hereof marked "E. Z." and is in words and figures as follows, to-wit:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

At the conclusion of plaintiff's testimony and without waiving any former motions or demurrer herein or its motion for a peremptory instruction, comes the defendant and by leave of court amends its answer herein to conform to the proof.

Now to conform to the proof the defendant further answering states, that in entering the service and employment of the defendant, plaintiff's intestate assumed the ordinary risks of such service, and that among them were the ordinary and usual jerking and jarring of the train and stopping and starting of the train which ordinarily and necessarily causes jerks and jars; that among such usual and ordinary risks so assumed by said plaintiff's intestate was the stopping of the train by the use of the air valve in the rear of the train, which usually, ordinarily and necessarily caused the train to jerk and jar; that the flagman, O. L. Hill, at the time and place referred to in plaintiff's testimony did use the air valve in the rear of said train and stop the train, thereby causing said train to jerk and to jar as was usual and ordinary and necessary under such circumstances and the risk of being moved or thrown under such cirsumstances was one of the usual and ordinary risks assumed by plaintiff's intestate when he entered the defendant's employment.

Defendant states that when said Hill used said air valve to stop said train it was necessary to do so for the purpose of preserv-
41 ing property from injury and damage, and in the exercise of a reasonable judgment said Hill believed it to be necessary to so stop said train for the purpose of preserving property from injury and damage, and the stoppage of said train under such circumstances in the urual and ordinary manner as was done by said Hill was one of the usual and ordinary risks which the plaintiff's intestate assumed when he entered the services and employment of the defendant.

Defendant further says that said Stewart's alleged injury, if injured at all, which it denies, was the result of the jerking and jarring of the train under the circumstances as above set out and was an ordinary risk necessary in the usual and ordinary operation of the train, which was assumed by plaintiff's intestate when in defendant's service.

And defendant pleads the said assumption of said risk by plaintiff's intestate as a bar to his action.

Wherefore it prays to be dismissed with its costs, and for all proper relief.

SIMS & RODES.

Be it further remembered that on the trial plaintiff offered to read the deposition of O. L. Hill to which defendant objected and the court excluded same, to which plaintiff excepted.

Said deposition will be copied a little further on in this record.

The jury having returned a verdict for the plaintiff and the judgment having been rendered thereon defendant filed written grounds and moved the court to vacate and set aside said judgment and grant it a new trial, which motion and grounds were overruled, to which ruling the defendant excepted at the time and still excepts and prayed an appeal to the Court of Appeals, which was granted. Now comes this defen*f*ant and tenders this bill of exceptions and also a transcript in duplicate of the official stenographer's report of
42 &43 the evidence and on its motion said bill of exceptions is examined, signed, attested and approved by the court and said transcript of evidence is examined, signed, attested and approved by the judge; and it is now ordered that they be filed and made a part of the record without being spread on the Order Book; and it is now certified that this bill of exceptions with said transcript of evidence contains all the evidence in this case.

McKENZIE MOSS,
Judge of the Warren Circuit Court.

Attested, examined and approved.

44 Warren Circuit Court.

Mrs. JANETTE STEWART, Adm'x, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Testimony.

Be it remembered that upon the trial of the above styled cause in the Warren Circuit Court, the following oral testimony was introduced.

Witness being duly sworn testified as follows:

Testimony of Mrs. W. H. Stewart.

(Direct examination by B. F. Proctor, Att'y for Pl'ff.)

Q. Mrs. Stewart, Where do you live?
A. In Bowling Green.
Q. What is your age?
A. I am thirty-one.
Q. When were you married?
45 A. In 1902.
Q. What was the name of your husband?
A. W. H. Stewart.
Q. Where was he raised?
A. In Bowling Green.
Q. What was your maiden name?
A. Miss Janette Sands.
Q. When did your husband die?
A. September 7th.
Q. What year?
A. In will be four years this September.
Q. September 1908 was it?
A. Yes sir.
Q. Where did he die?
A. In Bowling Green.
Q. How many children did he leave?
A. Three.
Q. These children were born to you and him after your marriage?
(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)
A. Yes sir.
Q. What is the age of your oldest child?
(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)
46 A. He was nine years old the 10th of March.
Q. What is the age of the next child?
A. Seven years old the 21st of March.
Q. What is the sex of the oldest child?
A. Boy.

Q. Next oldest?
A. Boy.
Q. The sex of the youngest?
A. The two oldest are boys and the youngest is a girl.
Q. What is the age of the girl?
A. Four years old the 9th of December.
Q. Where did your husband die?
A. In Bowling Green.
Q. How long had he been running for the L. & N.?
A. I don't know how long he had been running, he had been working for the L. & N. ever since he was about seventeen in different capacities.
Q. What was he doing when you were married?
A. Fireman.
Q. When was he promoted?

Obj. by Attys. for Deft. Obj. overruled, to which Deft. excepts.)

Q. When was he made engineer, and how long did he run?
A. I think he had been running about three years.
Q. Between what points?
47 A. Bowling Green and Paris.
Q. Was he hurt at any time, Mrs. Stewart while he was running?
A. He came in on September 5th and said he was hurt.

Obj. by Att'ys for Def't as what he said.)

(The Court here dismisses the jury from the room for a brief space of time until the question as to whether the witness may be permitted to answer as to what her husband may have said, can be determined.)

In the absence of the jury the witness testifies as follows:—

(Direct-examination by B. F. Procter, att'y for pl'ff, on the voire dire:)

Q. Did Mr. Stewart come home and state that he had been hurt?
A. Yes sir, he said that he had been hurt and went up next day to see the doctor and got some medicine, and they sent for him the next day to go out on the 8th and he didn't feel like going but they were short of men.
Q. Did he tell you about how he was hurt when he came back on September 5th?
A. No sir.
Q. What did he say to you about it?
A. He said "they stopped the train and I got my head hurt, I don't know whether that is the cause or not, but I am going to see the doctor, I feel awful bad."
48 Q. When did you see him prior to that and how was he feeling?
A. He was feeling all right, was feeling fine all summer. I never heard him complain at all.
Q. How long had he been out on the run?

A. Went out on the 2nd and came in on the 5th. There was different times he would come back if he would make a through run.

Q. What did he tell you afterwards, did he make any statement to you about the condition of his health or suffering or pain?

A. After that I asked him and he told me how it was.

Q. When was it?

A. On the 5th when he came in, but afterwards he explained to me how it was.

Q. When was it that he explaind it to you?

A. After he went out on the 8th and made these turn arounds to Guthrie and come back into Bowling Green, came back with his shoulder severely hurting him and said if the woman at the boarding house hadn't been so good to him he would have laid off and come home, and he told me about getting his shoulder hurt up against the engine cab and he said "the brakesman stopped me from the caboose" and I said, "What did he do that for"? and he said, "Ask him, I don't know, it was uncalled for, I don't know."

Q. He first told you September 5th and then went into details about it when he came back from Paris?

49 A. Yes sir, when he came back from Paris.

Q. Did he complain from that time until the time of his death or not?

A. He never was well after the 5th until he was paralyzed.

Q. Did he express himself to you about suffering frequently?

A. Why certainly.

Q. When was he paralyzed?

A. On the 22nd or 23rd. I think the 23rd.

Mr. Procter here cites authorities to the Court bearing upon this question of hearsay testimony as follows:

Also reads Rule 104. Also reads Rule 44, as follows:—"44. Three short blasts of the whistle when the train is standing (to be repeated until answered as provided in Rule 61) is a signal that the train will back. Rule 104 is as follows:—

50 104. "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman.

Att'ys for Def't object to the reading of said rule, upon which the Court rules that Mrs. Stewart may be permitted to testify to the bare fact that he received an injury on his trip, to which ruling Att'ys for Def't except.

Q. Mrs. Stewart, I will ask you now in the presence of the Court, to tell what your husband said to you when he came home?

A. That would be right hard to do, of course anybody talks and says a good many words that they would not remember afterwards. He just said—well, he was complaining and said, "I feel awful bad, I felt awful bad this trip," and I says, "what was the matter?" and he said, "I got hurt and am going to see the doctor," and I says, "Did you get hurt bad?" and he says "No, I don't guess, but I

am going to see Dr. Stone" and of course we talked about it just like a family would, but I don't remember anything else.

Q. What time was this?

51 A. On the 5th when he came in.

Q. How long after he got in before he went to see the doctor?

A. I can't say whether it was that evening or the next morning.

Q. When was it that he explained to you for the first time that this man angle cocked him?

A. After he went down the road and came back, and I asked him how he got hurt and he told me. He was a man that never railroaded at home at all, never said anything about railroading unless I asked him.

(Objection by Att'ys for Def't, to which objection the Court rules as follows: "The Court is of the opinion that Mrs. Stewart should be permitted to state the bare fact, if it is a fact, that her husband when he returned from the trip on September 5th was complaining of being sick or having been hurt, and that all of the details related by her husband to her on that or any other occasion as to how he was injured, or the manner of his injury is not competent." To that part of the ruling which permits the witness to state that her husband was feeling bad and that he had been hurt, Defendant excepts. And to the ruling of the Court holding incompetent the rest of her testimony on that point, the Plaintiff

52 excepts.)

Afternoon Session.

(Jury is now permitted to return to the Court Room.)

Q. Now Mrs. Stewart, tell the jury the condition of your husband from September 5th up to the time of his death just in your own way?

A. Well, he just seemed to be complaining from the time he would come to the house, with his head and shoudler hurting him from the hurt that he got on the road.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Go ahead.

A. Then from that on he was complaining, even down the road, and he would come in and tell me about it.

Q. Just tell his condition.

A. He was not bedfast but he didn't feel like working, still he thought you know——

(Objection sustained.)

Q. Just describe in a general way his condition as near as you can without stating what he said?

A. He just complained of a numbness of his arms and

53 shoulder and head hurting, and that is all that he complained of on up to Friday before he was paralyzed on the 23d, that was his last trip and he was complaining worse than ever and had to lay off.

(Def'ts move the Court to exclude the above answer from the jury which is overruled, and to which Ruling Def't excepts.)

Q. What day of the week did he die?
A. Sunday.
Q. What was his condition when he came in from his last trip?
A. Suffering severe pain from his head and shoulder.
Q. What day of the month?
A. It was on Friday before the 23d was on the next Tuesday, it was about the 20th.
Q. How many days before his death was he confined to his bed?
A. From Tuesday until Sunday.
Q. You spoke of paralysis, tell how that occurred?
A. Gradually, commenced with numbness and then with his tongue that morning, Tuesday morning when he got up he complained of it and seemed to feel so much worse and from that on, he laid down after dinner and when he got up he couldn't speak hardly at all only just a few words, and I sent for the doctor and he said that is was paralysis.

(Objection sustained as to what the doctor said.)

Q. What was his condition from Tuesday until the Sunday
54 following, the day of his death?
A. After Tuesday night he was unconscious until he died only he knew on Wednesday what I said but he couldn't answer me, and he knew what the doctors said but he couldn't answer them.
Q. You say he was unconscious from Tuesday night until his death?
A. He never spoke a word after Tuesday night.
Q. Did he lose the sense of taste that you know of?

(Objection sustained.)

Q. How was his appetite, was he able to eat?
A. He eat a little but said he couldn't taste anything that he was eating.

(Objection sustained as to what he said about what he ate.)

Q. Now what was the condition of his health prior to Sept. 5, 1908?
A. He was in good health all summer.
Q. You had been married to him how long then?
A. I expect six years or more at that time.
Q. During the time that you had been married to him how many days had he been confined from sickness?
A. He never was in bed but once and he had a spell of the grip in the spring.
Q. Did he recover from that?
A. Oh, yes, and that was the only sickness that he had ever
55 had since we had been married.
Q. What were his habits, what sort of a man was he as to labor and habits generally?

(Obj. by Att'ys for Def't. Obj. overruled to which Def't excepts.)

A. Well, he was a sober, straightforward man, and he made a good living that is about all I can say.

(Def't moves to exclude the above answer from the jury, which is overruled, to which ruling Def't excepts.)

Q. Was he economical or extravagant, how was he in money matters?

A. I guess he was as economical as he could be, he had to be and support the family.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How was he in the rearing of his family, how was he in his attentions to his children and to his famiiy?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He was interested in his family.

56 Q. What degree of attention did he give you in looking after and helping to rear these children?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. As good as any father could be.

Q. What did you say was his wages?

A. I expect it would range from $135.00 to $160.00 per month according to the runs that he caught.

(Counsel for Def't moves to exclude all that portion of her testimony relating to any pain or suffering of W. H. Stewart or that after the injury spoken of he suffered pain, which is overruled by the Court, to which ruling Def't excepts.)

Testimony of Mr. T. A. Sorrells.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you lived here?

A. *Often* and on about six years.

Q. Where were you raised?

A. Tennessee.

Q. What part of Tennessee?

A. Lincoln County.

57 Q. What experience have you had as a railroad man?

A. Six years.

Q. In what capacity?

A. Fireman.

Q. Do you know W. C. Minor?

A. Yes sir.

Q. Do you know H. T. Jones?
A. Yes sir.
Q. Did you know W. H. Stewart?
A. About two years.
Q. Were you with him on September 5th, 1908 when he was said to have been hurt on the siding at Cumberland City?
A. Yes sir.
Q. Who constituted his crew?
A. Jones, Hill, Minor, Stewart, and myself.
Q. Are they the same parties I have just mentioned here and gave their initials?
A. Yes sir.
Q. Where had your train come from?
A. Paris.
Q. Where to?
A. To Bowling Green.
Q. Do you know what time you left Paris?
A. Do not.
Q. Tell the positions of the different men on this train, what position each man held?
A. Hill was flagging, and Jones was conductor, Minor was
58 head brakeman, Stewart was engineer, and I was the fireman.
Q. Describe to the jury what position you and Stewart occupied on that train, in what part of the train?
A. On the engine.
Q. Coming North was he on the right or left hand side of the engine?
A. On the right.
Q. Your position was where?
A. Down in the deck.
Q. On the left hand, or deck?
A. I occupied the deck when I was firing.
Q. And then when the engine was moving where were you, when you were firing you occupied the deck, and when it was running where were you?
A. Down in the deck, had to be there to fire.
Q. Describe to the jury the location at Cumberland City, how many side tracks?
A. One.
Q. Do you know the length of that?
A. I do not.
Q. Do you know about how many cars it would hold?
A. No sir, I do not.
Q. Just tell the jury in your own way what occurred at Cumberland City, and if you took the siding there at Cumberland City to meet any trains or for any trains to pass, just in your own way tell all that was done there, the switching and movement of the trains?
59 A. We went to Cumberland City for # 103, and the side track would not hold us, we shoved the cars a little too far out and it wouldn't clear 103 and the flagman went out to flag 103, and

we got a signal to back up, and we backed up and the flagman angle cocked us and threw the engineer up against the car so he said and hurt his shoulder.

(Objection by Att'ys for Def't.)

Q. Did the engineer say it right there at the time?
A. Yes when I went over on that side of the engine.
Q. How long afterwards?
A. About fifteen seconds.

(Objection overruled to which Def't excepts.)

Q. Go on and tell all that occurred there?
A. I went over and asked him what was the matter, and he said the flagman angle cocked him and threw him up against the cab and hurt his shoulder and head, and that was all that was said, and he got down off the engine and was talking to the conductor, and that was all he said to me about it in Cumberland City.
Q. He said to you that it threw him up against the side of the cab and hurt his head?

(Obj. sustained, as witness had already stated that.)

60 Q. What effect did it have upon your train, the angle cocking that he done?
A. A sudden stop.
Q. What do you call the application of the air at that time?
A. Emergency.
Q. Was that in your judgment the proper application of the air for the switching that you were doing?

Att'y for Def't objects to the foregoing question, whereupon Mr. Procter, Att'y for Pl'ff, reads Rule 104 to the Court, which is as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman."
The Court, after the Rule being read, sustains Defendant's objection, to which ruling Plaintiff excepts and makes the following avowal: "We expect the witness to state, "No sir, it was not proper."

Q. Now Mr. Sorrells, I understand you to state that that train was put into emergency from the rear, is that right?
A. Yes sir.
Q. Where were you at the time?
A. In the engine.
Q. How far from Stewart?
A. On the left side and he was on the right hand side.
Q. How many feet would you say that was?
61 A. I don't know, 3 or 4 steps I reckon across the deck.
Q. What were you doing at the time the train went into emergency?
A. Ringing the bell.

Q. What effect did it have on your train?
A. A sudden jar, a jerk, a jar rather.
Q. What was the engineer doing at the time?
A. Backing up the train.
Q. Who was giving him the signals to back up?
A. The conductor.
Q. Where was the conductor?
A. Standing on the main track.
Q. What was the position of Mr. Stewart at the time?
A. He was up in the cab.
Q. Was his head in or out of the window?
A. I was on his side of the engine then and when the conductor gave the back up signal his head was out, that was his position before I went to ringing the bell.
Q. How long was it after you left him hanging out of the window before this emergency came?
A. Long enough to walk across the deck and ring the bell.
Q. What position should he have had at this time?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He should have been looking out for the signal.

62 Q. If you can, tell all that you now remember, the words that passed between you and Stewart when you went across immediately after the application of the emergency?
A. I asked him what was the matter and he said that the flagman angle cocked him and hurt him, bumped his head against the cab and hurt his shoulder.

(Obj. overruled; to which Def't excepts.)

Q. To refresh your recollection, did you not ask him at the time about the brakeman trying to kill somebody, if there was any such conversation, what did he say?
A. I never asked him that.
Q. If that in substance passed between you, what was it?
A. Well, I was on the other side of the engine when it occurred.
Q. When you passed over and had a conversation with him, if he said anything about killing any body, tell what it was?

(Obj. overruled; to which Def't excepts.)

A. He said he must be trying to kill somebody, is about all that he said.
Q. Was your train in the clear at the North end at the time you started backing?
A. No, sir.

Q. For what purpose did you go in at the South end?
63 A. To let 103 by.
Q. What time did you get in there?
A. I reckon we got in the side track about 9:25.
Q. Do you know what time 103 was due there?
A. Some time between 9:30 and 9:35.

Q. When the train was angle cocked from the rear what was the extent of the jar?
A. Why it was just a jar, that was all there was to it.
Q. A hard jar, or a soft jar?
A. Neither hard nor soft, but medium.
Q. It was an emergency jar, wasn't it?
A. Yes, sir.
Q. What was the signal he blew before he started back?
A. Three blasts of the whistle.
Q. Who gave him the signal to back?
A. The conductor.
Q. You were over ringing the bell?
A. Yes sir.
Q. What effect did that jar have on you?

(Obj. overruled; to which Def't excepts.)

A. I was standing just inside of the cab ringing the bell, and it overbalanced me and I fell up against the tank.
Q. After this emergency was applied what did you have to do with your train before you could remove it?
A. He didn't have to do anything.
64 Q. Didn't he have to fill his train, or pump up his train with air?
A. The train had to pump up.
Q. Were you in the clear when you stopped North?
A. I don't remember, I suppose we were though.
Q. Were you in the clear at the South?
A. No sir.
Q. When did you notice it?
A. After we was angle cocked.
Q. You don't know the length of the siding?
A. No sir, I was not back there at all when it stopped, and I don't know the length of the siding.
Q. How fast was your train backing?
A. I don't have any idea how fast. It was very slow.
Q. Is this the Book of Rules in effect at that time, the Air & Signal Book?
A. Yes sir.
Q. Is this another Book of Rules in effect at that time for the Transportation Department?
A. It is.
Q. How far did you back Mr. Sorrells, if you remember, in obedience to that back signal?
A. I don't remember how far we backed, we backed up enough to let 103 down the main track, but I don't know how far that was.
Q. You backed up far enough to let 103 down the main track?
A. Yes, sir.
65 Q. Do you think that you were in the clear when he applied that emergency?
A. I don't know, I was not on that side when he applied it.

Q. What sort of an engineer was Mr. Stewart? What sort of a man was he as an engineer?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Why he was as good as any other man I ever fired for.
Q. You are still in the employ of the Railroad Company?
A. Yes sir.

(Cross-examination by J. C. Sims, att'y for def't:)

Q. You have stated that when you reached Cumberland City that you took the side track there for #103. It was going South?
A. Yes sir.
Q. You entered the side track from the (not finished)——
A. Yes sir.
Q. Do you remember how many cars you had in your train that morning?
A. I don't remember how many.
Q. Your train was a freight train?
A. Yes, sir.

66 Q. And when you entered that side track from the South switch was there any cars ahead of your engine on that side track when you got to the upper end of the switch?

A. Yes sir.
Q. And as I understand when you got in on the side track that some of the cars which were ahead of your engine were not in the clear at the North end of the main track?
A. Yes sir, some of them were not in the clear.
Q. And the purpose of backing was to get the cars at the North end in the clear for 103 to pass?
A. Yes sir.
Q. What character of train was 103?
A. Passenger train.
Q. At the time you commenced to back your train after you had gone into the siding where were you?
A. In the engine on the left hand side.
Q. And the engineer on the right?
A. Yes sir.
Q. When you were on the left hand side you couldn't see each other could you?
A. Yes sir where he was sitting out at the right of the engine and I was standing in the back of the cab and could see.
Q. If you are up in the cab you can't?
A. No sir, when we are up in the cab we can't.
Q. Why?
A. The boiler is there.

67 Q. In order for you to see the engineer on the right hand side you would have to be back in the back wouldn't you?

A. I would have to be down, or climb over the boiler. In some engines you can see each other.
Q. On this engine how was it?

A. You couldn't.

Q. When this engine began to back did you see the man that gave the signal?

A. Yes sir.

Q. And that was the conductor, Jones?

A. Yes sir.

Q. Which side was he on?

A. Right hand.

Q. And I believe you stated standing on the main track?

A. Yes sir.

Q. And you were on the right hand side?

A. Yes sir.

Q. And when the signal was given by the conductor to back, you then went on the left hand side?

A. Yes sir.

Q. And you were ringing the bell as I understand?

A. Yes sir.

Q. That was your duty?

A. Yes sir.

Q. Now did you see the engineer at the time he began to back, did you see the engineer at that time?

A. No sir, couldn't see him.

68 Q. Did you see the engineer at the time the emergency was applied and the train stopped?

A. No sir.

Q. Why?

A. I was on the left hand side.

Q. So of your own personal knowledge you don't know what happened?

A. No sir.

Q. You have only got his word for it?

A. Yes.

Q. His position at the time the emergency was applied on the right hand side you do not know of your own personal knowledge?

A. No sir, not at the time the emergency was applied.

Q. Because you didn't see him?

A. No sir.

Q. If at the time the emergency was applied the engineer was looking out the cab window his left side would be next to the front part of the engine?

A. It is owing to which way he was looking out. He can look either way, he can turn and change sides.

Q. It would altogether depend on his position?

A. Yes sir, *in* the position he was in.

Q. And you don't know what that position was?

A. No sir.

Q. You were going very slow when the emergency was applied and the train stopped?

A. Yes sir.

69 Q. I believe you said you could not tell the distance you had backed after the signal was given before the emergency was applied?

A. No sir, I couldn't tell.

Q. In the operation of freight trains such as you were operating, state whether or not jerks or jars occur usually in operating freight trains?

A. Yes sir, at times.

Q. Well, now tell what kind of a jar this was when the emergency was applied?

A. Just a sudden stop.

Q. Was it any unusual jar?

A. I have had jars as hard as that at other times.

Q. Of frequent occurrence?

A. Not very often, a few times.

Q. You don't know the condition of the back of your train at the time you were backing or at the time of the emergency?

A. I do not.

Q. You didn't see back there, and was not back there?

A. No sir.

Q. You stayed on the engine all the time?

A. Yes sir.

Q. At the time the emergency was applied you didn't see the flagman at the rear end of the train?

A. No sir, I couldn't see him from my side.

Q. How long had you known Mr. Stewart before Sept. 5, 1908?

A. About two years.

Q. Hadn't you been firing with him prior to that time?

70 A. Yes sir, had been with him.

Q. Frequently?

A. Yes sir.

Q. I will show you "Engineman's Report" and will ask you if you are familiar with W. H. Stewart's signature?

A. Yes sir.

Q. I will ask you to examine the one of Sept. 5, 1908 and ask you if that shows that W. H. Stewart as engineman made a trip on that date?

A. That is his signature.

Q. Does it show that he made a trip at this time?

A. Yes sir.

Q. Where from and where to?

A. From Paris to Bowling Green.

Q. Do you remember what time you got in here on the 5th of Sept. 1908?

A. I don't remember, the card shows.

Q. Look and see.

A. Arrived in the yards 6:35, in the Round House at 7:10 P. M.

Q. Did you go out on the road with Mr. Stewart the next trip after you came in on the 5th?

A. No sir, I went out on a passenger run the next trip I went out.

Q. I show you another card dated Sept. 9th, 1908 and ask you if it was not signed by W. H. Stewart as engineer?

A. Yes sir, that is his signature.

Q. Who was the fireman with him then?
71 A. I was.
Q. Does that card show that?
A. Yes sir.
Q. From where and to where does the card show?
A. From Bowling Green to Paris.
Q. Does it show what time you got to Paris?
A. Yes sir.
Q. What time?
A. At 9 P. M.
Q. Does it show the time you left Bowling Green?
A. 9:40 A. M.
Q. Well, examine card dated 9/10, 1908, and state whether or not that card was signed by W. H. Stewart, engineer?
A. It is, this is his signature.
Q. Who was fireman with him then?
A. I was.
Q. Where was that trip, from where to where?
A. From Paris to Guthrie, and from Guthrie to Paris.
Q. You turned and returned to Paris?
A. Yes sir.
Q. What time did you get to Guthrie that day as shown by the card?
A. 8:20 A. M.
Q. What time did you return to Paris?
A. 2:35 P. M.
Q. I now show you engineman's report signed by W. H.
72 Stewart engineer dated 9/14, 1908, and ask you if that is Mr. Stewart's signature to that report?
A. It is.
Q. That trip is from where to where?
A. 247 to 164 return to Paris.
Q. What do you mean by that?
A. From Paris to Guthrie.
Q. What time did you arrive at Guthrie?
A. 2:20 A. M.
Q. What time back to Paris on the return trip?
A. 1:20 P. M.
Q. I will show you another report dated 9/16 1908 signed W. H. Stewart as engineman, is that his signature?
A. Yes sir.
Q. What trip does that report show?
A. From Paris to Bowling Green.
Q. What time does it show?
A. We left Paris at 12:30 A. M.
Q. Arrived at Bowling Green?
A. 1:50 P. M.
Q. I will now show you another report signed W. H. Stewart engineer dated 9/18 1908 and ask you if this is W. H. Stewart's signature?
A. It is.

Q. Are these signatures of the same W. H. Stewart that you were on the engine with as fireman on September 5th 1908?

A. Yes sir.

Q. What does that report show, as to what trip?

A. From Paris to Bowling Green.

73 Q. What time does it show he left Paris?

A. 1 P. M.

Q. What time did he arrive in Bowling Green?

A. 1:57 A. M. on the 19th.

Q. I now show you engineman's report signed "Engineer W. H. Stewart" dated 9/2 and ask you whose signature as engineer is on that card?

A. Mr. Stewart's.

Q. I now show you two other reports signed as engineer W. H. Stewart in 1908 and ask you whose signatures are they?

A. That is his signature to those cards.

Q. Now I will get you to examine these reports which I have shown you and state in whose handwriting those reports are made out all of them, just look through them, figures, names, and all, and state in whose handwriting those reports are made out?

A. W. H. Stewart's.

Q. From September 5th 1908 from the first card, is there any change or difference in his handwriting on those cards from September 5th up to September 18th 1908?

(Objection sustained.)

Att'ys for Def't avows that if the witness were permitted to state he would say "None whatever."

Q. In a freight train, say of thirty or forty cars, about

74 how much slack would there be?

A. Almost a car length, maybe more.

Q. What is the average car length of freight cars?

A. I can not tell you.

Q. In your judgment about how many feet would the slack be when there was thirty or forty cars?

A. Between 30 and 40 ft. I expect.

Q. If there is that much slack in a freight train state whether or not in the operation of a freight train there is bound to be more or less jars or jerks in stopping and starting trains?

A. Yes sir.

Q. Was the jar at the time your train was backing slowly and the emergency applied on that side track any more than an ordinary or usual jar incidental to the ordinary operation of freight trains?

(Objection overruled, to which Pl'ff excepts.)

A. I have had jars similar to that several times.

Q. Was it any greater than is usual and ordinary in the operation of freight trains of that character, and don't such jars frequently occur in the operation of freight trains?

A. Yes sir, we have such jars frequently.

(Att'ys for Pl'ff move to exclude the above question and
75 answer from the consideration of the jury, which is overrules, and to which plaintiffs except.)

Q. At the time the emergency was applied after you had begun to back your train, if I understood you in answer to Mr. Procter, you were ringing the bell?

A. Yes sir.

Q. Were you standing against anything, or standing in the open ringing the bell?

A. I was not standing against anything.

Q. And if I understood you, you were standing in that position when the emergency was applied, it stops immediately, and when the emergency was applied it threw you off of your balance and threw you up against the tank?

A. Yes sir.

Q. The sudden stopping of the train overbalanced you?

A. It did.

(Redirect examination by Mr. Procter, Att'y for Pl'ff:)

Q. I understood you to say to Mr. Sims that you had felt such jars as were given at that time a few times before, is that right?

A. Yes sir.

Q. Such jars are only made in case of an application of the emergency brake, are they not?

A. Sometimes an engineer can make an application and
76 draw off 10 lbs. and there will be quick action triple and make such jerks.

Q. That has the effect of an emergency jerk?

A. Yes sir.

Q. That makes a hard jerk?

A. Not such a hard jerk but an unusual jerk liable to damage property.

Q. For what reason is the use of the emergency forbidden, why is it forbidden?

(Objection sustained.)

Special Rule governing the use of Air Brake & Whistle Signals, page 18, read to the jury and offered as evidence by Att'y for Pl'ff.

Said Rule read by Att'y for Pl'ff as follows:

"The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Q. What is the danger in the use of the emergency brake, if any?

77 (Obj. overruled; to which Def't excepts.)

A. It is liable to pull out weak drawheads.

Q. What else?

A. A sudden jar of the train.

Q. Well, what effect does that have and what is the danger of a sudden jar such as the emergency makes?

(Obj. overruled; to which Def't excepts.)

A. I don't know, you don't know what a jar would make.
Q. Is there any danger of hurting the men on the train?

(Obj. overruled; to which Def't excepts.)

A. I don't know whether it would or not, I never was hurt.
Q. Isn't that the reason that it is forbidden in ordinary use?

(Objection sustained.)

Testimony of W. C. Minor.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green.
Q. Do you know H. T. Jones?
A. Yes sir.
78 Q. Where is his home now?
A. Paris, I think.
Q. When did he move to Paris?
A. I won't be positive, but I think sometime last fall.
Q. How long have you been in Bowling Green?
A. About eighteen months.
Q. Where were you raised?
A. In Stewart County, Tennessee.
Q. Near Cumberland City?
A. Yes sir.
Q. What is your occupation?
A. Brakeman.
Q. How long have you been braking?
A. About five years I guess.
Q. What occupation did you have prior to that time?
A. I run a train here a while since I have been on the road; I was a farmer before I went on the road.
Q. When did you begin railroading?
A. January, eight years ago.
Q. How long did you run a train during that time?
A. About three years.
Q. When did you quit running a train?
A. I don't remember just what date.
Q. How long have you been running constantly as a brakeman?
A. I can't say just how long, it has been some little time.
Q. About three years though you ran as conductor?
A. Yes sir.
79 Q. Were you in September 1908 on the train at Cumberland City when W. H. Stewart is said to have been hurt?
A. Yes sir.
Q. Who constituted the crew?

A. H. T. Jones, O. L. Hill, W. H. Stewart, Mr. Sorrells and myself.

Q. Tell what position each one occupied?

A. O. L. Hill was flagman and I was head brakeman, Sorrells was fireman, Stewart was engineer, and Jones was conductor.

Q. What was the full name of Stewart?

A. W. H., I think.

Q. What occurred on that trip at Cumberland City? Tell the jury in your own way what occurred there, and for what purpose you stopped at Cumberland City?

A. We stopped in there to head in for 103, the South bound passenger train and after we had headed in and pulled in the clear at the South end of the siding we were a little out of the clear at the North end, and we had to back up some to get in the clear at the North end to let 103 down the Main line. And while we were backing up as they started to back up they were angle cocked from the rear of the train.

Q. What would you call that stop?

A. Emergency stop, conductor's valve.

Q. Tell the jury what effect that had on the train?

A. It threw the brakes on in an emergency and stopped every car including the engine, at once.

80 Q. If it jarred your train, tell the jury what sort of jar it gave you?

A. Of course it had some jar to it, a right smart.

Q. How would you describe that jar?

A. As an emergency jar I reckon you might call it?

Q. Was it a hard jar or a light jar, or what would you term it?

A. I don't know it was a right smart jar, it was a sudden stop all at once and at one time.

Q. Describe it.

A. That is as well as I could describe it, just a sudden stop which threw the brakes in emergency stopping it all at one time.

Q. What was the effect to those cars in front of the engine were there any brakes set upon them?

A. No sir.

Q. What effect would that have upon a train, the cars without any brakes, upon the engine?

A. That would not have very much effect upon the engine, the brakes being in emergency.

Q. You gave your deposition in this case didn't you?

A. Yes sir.

Q. You were asked about those brakes coming together at that time weren't you?

A. Yes sir.

Q. Did you or not upon that occasion say that the emer-

81 gency caused a great lick or jar when the train ran together? and isn't that true?

(Objection sustained, whereupon plaintiff makes the following avowal: We expect the witness to state that the emergency caused a great jar or lick when the train ran into emergency.)

Q. What was the position of Mr. Stewart when the switching was being done?
A. Hanging out of the window, part of the body.
Q. Why was he hanging out?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Taking signals I suppose.
Q. Did you hear Mr. Stewart complain of being hurt immediately after the injury?
A. Not shortly.

(Objection by Att'ys for Def't.)
The Court: How long after the alleged injury before you saw him?
Answer: Maybe ten minutes, something like that."
The Court: "I will sustain the objection."
Att'ys for Plaintiff makes the following avowal: "He says
82 that he was hurt."

Q. You are familiar with the use of the air brakes and signals in effect at the time of this injury?
A. Fairly well, yes sir.
Q. What is the danger, if any, in applying the brakes as Hill did on that occasion?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. The danger to property, tearing up some part of a train, might be.
Q. Any other danger?
A. There would be to persons if there should be any around the train and on it.
Q. What about the train crew?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. If there was any that might be on the train or about it it is liable to hurt them in some way.
Q. Do you ever apply the emergency brakes when the engineer and conductor is both on the train in charge of the train?
A. Yes sir.
Q. For what purpose should it be applied under such
83 circumstances. Under what circumstances should it be applied?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. To prevent danger to property or life.
Q. Give instances of such application in your judgment that it would be proper to apply it?

(Objection overruled; to which Def't excepts.)

A. In case of a break down or a car off the track or likely to run over some one or something, you would use the brake.

Q. For what purpose were you backing this train when that emergency stop was applied?

A. To get in the clear at the North end of the siding.

Q. From what direction was 103 coming?

A. South bound.

Q. What part of your train would 103 necessarily pass first?

A. The North end.

Q. When you started backing, under the Rules and customs of the Company what should that rear brakeman have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. He should have looked after the rear of the train and
84 if necessary open the main line switch.

Q. Well, did he open the switch?

A. I don't know whether he did or not.

Q. Did he open the switch before he applied that emergency?

A. I don't know.

Q. How did you let 103 by?

A. Backed down enough to clear the North end of the siding.

Q. Did you have to saw by?

A. Yes sir, I think we did as well as I remember.

Q. Do you remember whether or not there was any other train standing on the main when you headed in there?

A. I don't remember.

Q. Your recollection is that you did saw by 103?

A. Yes sir.

Q. Why?

A. Because the siding did not clear us.

Q. Do you remember how long you were in that siding?

A. No sir, do not.

Q. How long were you required to clear 103 at that time?

A. Five minutes.

Q. Do you think that was the full time at that time?

A. Yes sir.

Q. Then you could not as I understand clear or let 103 by without the South end of your train running out upon the main line and through that switch?

(Objection to the question by Att'ys for Def't.)
(Question is withdrawn.)

85 Q. Why was it necessary for you to saw by?

A. Because the siding did not clear the train.

Q. Then in order to do this what did you have to do with your train?

A. We had to back far enough to the South end of the siding to clear the North end of the siding.

Q. Did or not the rear end or South end have to go out upon the main track at the South?

A. I don't remember how far they backed up, it might have been that they could have backed their train right on the frog of the track.

Q. Wouldn't that have obstructed the main line?

A. Yes sir.

Q. Isn't it true that you could not with that train on the siding in addition to the cars that you brought there have both ends of your train in the clear?

A. No sir I don't think we could.

Cross-examination by Jno. B. Rhodes, of Counsel for Def't:

Q. You don't state that the South end had to be backed out on the main line?

A. No sir, I was not back there.

Q. Where were you?

A. At the North end of the siding, I flagged 103.

Q. You were at the North end of the siding and North of
86 the engine?

A. Yes sir.

Q. You were further than anybody from the South end of the train?

A. Yes sir.

Q. When you stated that you thought that your train could not clear the main track, that might be because the South end of your train the caboose approached so near the frog of the switch as not to clear it?

A. Yes sir.

Q. Show the jury that that is the main line and this is the switch, that would be the frog right there, and this would be the point of the switch?

A. Yes sir that is right.

Q. And your train might get so close down here as to get in the way of trains going on the main track, and then you would say "out of the clear"?

A. Yes sir.

Q. So your train might be entirely on the side track and yet not be in the clear entirely?

A. Yes sir.

Q. When you moved in on the side track you found that you were out of the clear on the head end?

A. Yes sir.

Q. Why was that?

A. Because that car leading to the main got too far up.

87 Q. There were several cars that didn't belong to your train up here?

A. Yes sir.

Q. But one of them got so close to the main track as to get out of the clear, so if 103 came along it might have swiped them, and yet these cars were entirely in the side track?

A. Yes sir.

Q. And you had to back down to get these cars in the clear and let 103 go by?

A. Yes sir.

Q. You were at the North end and away from where this transaction occurred?

A. Yes sir.

Q. When you got these cars in the clear at the North end then 103 could come down on the main track opposite the depot?

A. Yes sir.

Q. And then you could pull out Northward and leave the rear end in the clear?

A. Yes sir.

Q. And that is what you mean by "sawing by"?

A. Yes sir.

Q. And then 103 could pass on South?

A. Yes sir.

Q. You told Mr. Procter you didn't recollect whether or not when you came up here there was a train standing there waiting for you or not?

A. I don't remember.

88 Q. If there was such a train standing there on the main all you had to do was to come in on the side track until you cleared the South end and that train could move on South?

A. Yes sir.

Q. Now when you got up here you went North to flag 103, then your train began to back slowly South?

A. Yes sir.

Q. Did you see it when it stopped?

A. Yes sir.

Q. Is it not true that down there at Cumberland City there are a couple of roads crossing the track, both the side and main track near the depot there?

A. Yes sir.

Q. One of them is just a little North of the South switch?

A. Yes sir.

Q. You don't know how they were headed in there, just North of this road that crosses the South switch?

A. No sir.

Q. Because you were away up front?

A. Yes sir.

Q. State whether or not when you got in there on that side track it was not only your duty to clear the main track too, but to protect these crossings?

A. Yes sir.

Q. What do you mean by that?

A. To cut the cars so as to let people pass, people driving coming across there.

89 Q. And see that they ain't hurt as they pass, just simply dividing the cars?

A. Yes sir.

Q. When was it that you saw engineer Stewart there when you started up to flag 103?
A. Just as I was going out to do the flagging.
Q. Is that the last time you saw him at that particular time, before the train stopped, as it was backing up?
A. No sir I saw him as they were backing up, I just stood ahead of the train as we were backing down?
Q. Where was he?
A. In the cab window of the engine.
Q. Was he hanging out the window or do you know?
A. He had some of his body out the window.
Q. How far was he hanging out the window?
A. I can't say how much of him was hanging out of the window.
Q. Did you see the fireman?
A. I don't recollect about that.
Q. Mr. Minor, you have run on freight trains, haven't you?
A. Yes sir.
Q. State whether or not there is usual and customary in the ordinary operation of freight trains, jerks and jars, necessarily resulting from the ordinary operation of freight trains?
A. Yes sir.
Q. Incidental to the operation of such trains are there jerks and jars?
A. Yes sir any train jerks more or less when it is running.
90 Q. And in stopping and starting too?
A. Yes sir, severe ones.
Q. Is that usual and customary in the operation of freight trains on railroads?
A. Well, it occurs every day.
Q. Is there any slack in a train of cars?
A. Yes sir.
Q. About how much in a train of 34 cars?
A. Between 20 and 30 feet.
Q. In stopping a train of that sort, do the cars bump together and jerk and jar?
A. Yes sir.
Q. Do they feel that, anybody that is on the train?
A. Yes sir, they feel it more at the rear of the train than at the head end.
Q. You mean when the engineer does the stopping himself?
A. Yes sir.
Q. Isn't a train so equipped from the rear of the caboose and also the front end?
A. Yes sir.
Q. What is that instrument used for the back there?
A. The angle cock.
Q. You speak of that when it is stopped from the rear there as angle cocking the train?
A. Yes sir, and the one in the caboose is called the conductor's valve.
Q. You say you saw that train stop on that occasion?

A. Yes sir.

91 Q. State whether or not such jars and jerks, were there any jerks and jars there on that occasion?

A. It was an emergency lick, it stopped everything suddenly when the brakes went on; it stops every wheel from the engine to the caboose, and stops the train.

Q. Isn't it a fact that such jerks and jars equivalent to them are usual and customary and frequent in the operation of freight trains?

A. Yes sir.

Q. How was it proceeding, backing slow or not?

A. Slow.

Q. How slowly?

A. I couldn't say, not very fast.

Q. On a siding that way you have necessarily got to go back slowly haven't you?

A. Yes sir.

Q. Necessarily you could not operate very fast?

A. We would not there because were only going to back a short piece.

Q. And that was when the train was stopped?

A. Yes sir.

Q. Such jerks and jars are met with all the time in railroading on freight trains ain't they?

A. Yes sir.

Q. Now in giving Mr. Procter some instances a while ago when a train might be stopped by the use of the air brakes in emer-

92 gency, you don't mean to say that they were the only instances in which it could be so used?

A. No sir, not the only ones.

Q. There are causes arising all the time aren't they in which the air brake may be used in emergency?

A. Yes sir.

Q. And every case differs from the other?

A. Yes sir.

Q. And in all cases in which either property or life may be injured it may be used?

A. Yes sir.

Q. And is constantly used for those purposes?

A. Yes sir.

Q. Mr. Procter read to the jury these words a while ago: "The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Aren't these words "returning the handle of the lever" and so on, don't that apply to the engineer?

A. Yes sir.

Q. There is no handle to the lever to be applied by the flagman using the angle cock in the rear?

A. No sir.

Q. And this applies to the engineer in operating a train?
A. Yes sir.

93 (Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. You say to Mr. Rodes there that this emergency is used and that there is jerking and jarring of trains daily. There is always some jarring of trains in the running of them, isn't there Mr. Minor?
A. Yes sir.
Q. Do you mean to tell Mr. Rodes that you apply the emergency on the train every day?
A. I didn't say every day, I said it was frequently done.
Q. The emergency stop, however, is only to avoid danger to life or property?
A. Yes sir.
Q. How many times did you ever put a train in emergency?

(Obj. by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I don't remember, I remember a good many times, but I can't tell how many.
Q. Didn't you state in your deposition that you only remembered twice that you had put the train in emergency?

(Objection sustained.)
(Att'y for Pl'ff makes the following avowal:
"We expect him to state "Yes."

94 Q. Would you regard it proper to use the emergency brake to bunch the slack in a train?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No sir, I would not.
Q. Would you regard it proper to apply the emergency to keep a car from going across a crosing, to prevent it from blocking a crossing unless there was something on there, men, horses, property or something to be injured by it?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No sir.
Q. Wouldn't it be a very easy thing if it had obstructed the crossing, to pull it back off of the crossing and open the crossing?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. Yes sir.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

95 Q. If your train was backing up along this switch down here Southward, and this switch was closed and that train ran into it, it would destroy and split that switch and destroy that property?
A. Yes sir.

Q. I believe you say in all cases where it would damage property emergency is to be used?

A. Yes sir.

Q. If the switch was damaged the section crew would have to be called and it might result in injury to the coach, is that correct?

A. Yes sir.

Testimony of John Sharpe.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your occupation?

A. In the livery business and transfer business now.

Q. How long have you been in that business?

A. Fourteen years or a little over since '97.

Q. Have you ever run on the railroad?

A. Yes sir.

Q In what capacity?

A. I have broke and run a train too.

Q. For how long?

A. About seventeen years and four months.

Q. Are you familiar with the use of the air brake?

A. Yes sir.

96 Q. Are you familiar with the signals given in backing, stopping, and movement of trains in yards?

A. Yes sir.

Q. Are you familiar with the use of the air brake and air brake rules in effect in September 1908?

A. Yes sir.

Q. And the rules for the switching of trains at the same time?

A. Yes sir.

Mr. Sims asks the following questions upon the voire dire:

Q. Mr. Sharpe, you haven't railroaded any for the past fourteen years?

A. It has been a little over fifteen years.

Q. And you have been in the transfer business for nearly fourteen years?

A. Yes sir a little over.

Q. And you quit railroading before you went into the transfer business?

A. Yes sir.

Q. Since you quit operating trains there has been a great improvement?

A. I don't think there has about the air and signals, I think it is about the same now as then.

Q. You know nothing about the rules of air brakes that were in force in September 1908?

A. They hadn't changed any, if they had I hadn't heard of it.

97 Q. You had no reason to familiarize yourself with the rules?

A. There was no reason to change them.

Q. You have made no investigation of them in the last fourteen years?

A. On, no, only I see them around the depot there all the time, and have noticed on change.

Q. You haven't examined the Book of Rules as to Air Brakes that was in force and effect in 1908?

A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that you have examined the Book of Air as to use of the emergency brake, and the application of air by the different men?

A. Not unless they have a new one out, I have examined the one in use in '97 and there has been no change, I guess the air works just like it always did.

(Objection by Att'ys for Def't.)

The Court: "Unless the witness is able to state that they are the same he will investigate and find out."

98 *Testimony of John Sharpe, Recalled.*

(Examined by B. F. Procter, Att'y for Pl'ff:)

Q. You were on the stand yesterday afternoon, now I will get you to state if you are familiar with the Rule for operating freight trains?

A. Yes sir.

Q. Now what would be the proper manner of operating a train by the rear brakeman in the event that his train was on the siding such as at Cumberland City and the engineer should give back up signal and the train would not clear the crossing, and it was a meeting point for a train of superior class, the train on the crossing being a freight train, and the other a passenger train, and the rear brakesman had the switch lined up for the main track instead of for the side track, what would be the proper thing to do under the rules and customs of the Railroad Company, which were in effect in 1908?

(Objection by Att'ys for Def't. Objection sustained.)

99 *Testimony of Chester Younger.*

(Direct examination by B. F. Procter, Atty' for Pl'ff:)

Q. How old are you?

A. Twenty-three.

Q. Where do you live?

A. About a mile from the city, on the Smallhouse Pike.

Q. Where were you raised?

A. About the same place.

Q. What experience have you had as a railroad man?

A. Worked in the yards as switchman about three months from June to September, year before last, 1910.

Q. When did you run as fireman?
A. From September until December about the 15th.
Q. Have you investigated the Rules of the Company as to Rules and the effect of the use of the air and the duties of brakesmen and of engineer, as to whether or not they are the same in 1908 as when you were on the road?
A. About the same thing, yes.
Q. Are you familiar with the way in which a train should be handled and operated by the engineer, fireman, brakesmen, and conductor, using the air and the emergency application of air in September 1908?
A. If it was like it was when I was on the road I am very well acquainted with it, of course I didn't run very long.
Q. Do you regard yourself as familiar with what would be
100 the duty of this man on the side track in switching?
A. Yes sir, I do.
Q. You say from investigation that the Rules in 1908 were the same as those that were in effect when you were running in 1910?
A. The same as far as I know, I don't know so much about what they were then, but I think they are about the same as they were in 1910.
Q. Did you ever run between Bowling Green and Paris?
A. Yes sir that was my run.
Q. Are you familiar with the side track at Cumberland City?
A. Yes sir.
Q. Now are you familiar with the emergency application of air?
A. Yes sir.
Q. And the Rules governing it?
A. Yes sir.
Q. Under what circumstances is the emergency application made?
A. Well it is just made in cases——

(Objection by Att'ys for Def't upon the grounds that the Rule speaks for itself. Objection as to that point sustained by the Court.)
(Obj. is also made as to the competency of witness by
101 Att'ys for Def't.)
(The jury is now excused from the room, while the witness is examined as to the voire dire.)

(Examined by J. C. Sims, Att'y for Def't:)

Q. Did you ever serve as brakeman?
A. No sir.
Q. At no time?
A. No sir.
Q. You only served as fireman about three months?
A. Yes sir.
Q. When was that?
A. From September until December.
Q. In what year?
A. 1910.

Q. You were never examined on the Rules as to brakesmen?
A. No sir.
Q. And had no experience as a brakeman?
A. No sir.
Q. And the only other service you did in connection with the Railroad Company was switching in the yard in Bowling Green about three months?
A. Yes sir, from June until September 1910.
Q. You have never examined the Rules in regard to air that were in effect in 1908?
A. No.
Q. Never have.
A. No.

102 (Examination by Mr. Procter, of counsel for plaintiff:)

Q. I here show you a book marked "W. H. Stewart" 1908 revised, and will ask you didn't you have a copy of that same book and were governed by the same rules?
A. Yes sir, this is the same book, revised January 6, 1908.
Q. Here is another book dated December 1st 1898, I will get you to examine and see if on page 16 the use of the emergency is not prohibited just as it was in the Book of Rules of January 6th 1908?
A. Page 16 in this Book too?
A. No sir, Page 18 in that book.
A. "Emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired." That is in both books.
Q. This book of January 6th 1908 is a revised book?
A. Yes sir.
Q. Now I show you another book of Rules, Louisville, Ky., 1903, John P. Morton & Co., Rules for the Government of the Transportation Department, reissued August 22, 1907, and get you to state if the rules in that book governing signals and the application of air and the duties of the brakesmen and engineer
103 and fireman, are not the same as in the book of rules that you had furnished you at the time, there on page 9, and then on page 10, here are the signals, and bell cord signals, I will get you to tell *is* they are not the same as they were in your book?
A. These signals are the same.

The Court: "The question in this case is, he may be familiar with the Rules but has not had experience sufficient to know what should be done in case of emergency."

Mr. Procter: "Mr. Younger were you examined on the Rules as fireman?"
A. No sir.

The Court: "I don't think he has had sufficient experience to

know what should be done in emergency, he is a bright young man, but I don't think he is competent to testify as an expert, six months is not much experience."

Mr. Rodes: "Judge, I would like to know what question Mr. Procter wants to ask him, and I want the record to show that."

104 Mr. Procter: "Well, if the Court says that he is not competent."

The Court: "I don't think this witness is competent."

(Examination of witness continued by Mr. Procter:)

Q. Mr. Younger, are you familiar with the operation and management of trains in backing and moving on side tracks, and the use of the emergency brake?

A. Yes sir, I am.

Q. In your judgment, say that a freight train was on the side track at Cumberland City and it is necessary for 103 to pass this train, 103 was a passenger train with a superior right, and the siding would not clear the freight train, and it was necessary to do what is termed in railroading "saw-by," now in your judgment what should be done by the engineer and the men governing the operation of his train by signals?

(Objection by Att'ys for Def't for the reason that Rule specifies what should be done.)

The Court: "Here is a Rule for the application of the emergency brake which in substance provides that the emergency should be applied to prevent damage to property or life. I am inclined to believe that evidence might be introduced when the loca-

105 tion has been shown and the distance can be stated to a witness who is sufficiently qualified by experience and actual practice and operation of trains under similar circumstances, to show whether or not that was a proper or improper application of the emergency air brake, but this young man is not a competent witness, it must be a man that has had sufficient practical everyday experience, who has encountered such conditions, and have dealt with them. Objection sustained."

Att'y for Pl'ff makes the following avowal: "We expect the witness to state in answer to the question that he is familiar with the operation of trains and signals and that the rear brakeman as soon as he heard the signal given, which was three short blasts of the engine, that he should have gone back and opened the switch and then there would have been no necessity for the application of the emergency."

Q. Is the emergency application of the air a usual or unusual occurrence?

(Obj. by Att'ys for Def't. Obj. sustained.)

Att'y for Pl'ff makes the following avowal: "It is a very

106 unusual occurrence and a very dangerous thing to persons and to property, and during my experience of six months I have never seen it applied more than once or twice, and they were in extreme cases of danger."

Jury is now permitted to return to Court room.

Testimony of W. C. Minor, Recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. I will get you to state to the jury if that side track down at Cumberland City is constructed as it was in September 1908, and the same length now as it was in September 1908?
A. I think it is as well as I remember.
Q. You don't know of any changes?
A. No sir.

(Plaintiff here offers to read the deposition of O. L. Hill to jury, taken in this case, on March 30th 1912 and filed. Att'ys for Def't object to reading of said deposition, and the Court being advised adjudges that the deposition is not competent, as the witness is in attendance in court, and excludes the deposition, to which ruling the plaintiff objected and excepted.)

107 *Testimony of O. L. Hill.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Paris, Tennessee.
Q. What is your age?
A. Thirty-five years old.
Q. What is your occupation?
A. Conductor.
Q. How long have you been conductor?
A. A fraction over three years.
Q. What was your position in September 1908, Sept. 5, 1908, when W. H. Stewart is said to have been hurt at Cumberland City?
A. Flagman.
Q. Were you with the train on that occasion?
A. Yes sir.
Q. Give the different members of your crew and the positions they occupied?
A. Hugh Jones, Conductor, W. C. Minor, head brakeman, myself as flagman, Stewart as engineer, and Sorrells as fireman.
Q. Did you make the emergency application or brake on that occasion?
A. Yes sir.
Q. For what purpose did you make that application?
A. To comply with the Rules of the Company.
108 Q. Is that your only answer?
A. And to save property.
Q. For what purpose did you make that application?
A. To prevent splitting the switch.
Q. What was the movement of the train at the time?
A. Backing up.

Q. Isn't it true that you applied that emergency to stop that train from backing?

A. Yes sir.

Q. Your deposition was taken in this case, wasn't it?

(Objection sustained.)

Q. Was that your only purpose in applying that emergency?

A. To protect the switch and to keep the train off the main line, you can read it if you want to.

Q. For what other purpose?

A. To prevent splitting the switch.

Q. No other purpose?

A. That is the only one that I can see.

Q. Didn't you apply that emergency too to bunch the slack?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. It did bunch the slack, yes sir.

Q. Didn't you apply it to bunch the slack?

A. Not at all, no sir.

109 Q. For what other purpose?

A. And to prevent the train going on to the main line and splitting the switch.

Q. Don't you remember stating a moment ago that a part of your purpose was to bunch the slack in the train?

A. I said I did bunch the slack.

Q. Didn't you say that it was part of your purpose to bunch the slack?

A. I said a while ago, you asked me my reasons for applying the emergency and I told you to protect the switch, to prevent it from running on to the main line and in applying the emergency I bunched the slack and stopped the train.

Q. Didn't you say and isn't it true, that you applied that emergency to bunch the slack and that was part of your object?

(Obj. by Atty's for Def't. Obj. overruled; to which Def't excepts.)

A. That is part of it.

Q. Isn't it true that you applied that emergency in part to keep the train from blocking the crossing?

A. If the train had blocked the crossing it would have been out of the clear of the main line.

Q. Answer my question.

110 A. I answered it.

Q. Didn't you apply that emergency in part to prevent that train from blocking the crossing?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. I stated a while ago if I had blocked the crossing I would have fouled the main line, so I angle cocked this train to keep it from fouling the main line, so I evidently would have to get on the crossing or went out on the main.

(Att'y for Pl'ff insists upon a full answer to the question, and not an argumentative answer.)

The Court: "If the question can be answered "Yes or No," answer it in that way."

A. Yes.

Q. I will get you to tell how far, how many crossings are there there?

A. Three crossings, two freight crossings and a passenger crossing.

Q. When the train headed in where did you go?

A. I rode the rear end of the train up to the switch.

Q. Then what did you do?

A. I got off and threw the switch for the main line.

Q. Was that before or after your train had headed in?

111 A. After we had headed in.

Q. Did you find any other train there?

A. Supposed to be 115, I don't remember the number.

Q. Was that a freight train?

A. Yes sir.

Q. When you pulled in at the South end of*f* the crossing what became of 115?

A. They left Cumberland City ahead of 103.

Q. And you remained there for the purpose of letting 103 pass?

A. Yes sir.

Q. Where did the caboose stop when you headed in there?

A. Somewhere North of the first crossing.

Q. How far?

A. I can't say exactly.

Q. About?

A. I wouldn't try to say because I wouldn't be positive.

Q. A hundred yards?

A. No sir, couldn't have been a hundred.

Q. Or 150?

A. No sir, couldn't have been 50.

Q. Was it 40.

A. I can't answer you and be definite about the feet at all.

Q. Would it have been fifty yards North of the first crossing?

A. It would have been out on the main line in that way.

Q. I mean fifty yards North of the South crossing, you

112 say that the South end of your caboose is not as much as fifty yards North of the South crossing?

A. No sir.

Q. How wide is that crossing?

A. I suppose about fifteen feet, a common wagon crossing.

Q. How far do you have to go North or South of that crossing before your train is in the clear?

A. Just off the crossing to clear the crossing.

Q. North or South?

A. It would be North of the crossing.

Q. How much do you call the clear, how much between the rails?

A. So one car would clear another.

Q. How many feet?
A. I can't say, I never measured it.
Q. 6 ft. or 10 ft., what would you guess?
A. I would not attempt to guess at it.
Q. You have some judgment, is it as much as 10 ft.?
A. No, not as much as 10 ft.
Q. How much, would as many as 4 ft. clear it?
A. 4 ft. would clear it, yes.
Q. Do you know whether any less than 4 would clear it?
A. I wouldn't say.
113 Q. How far from the South crossing to the switch point?
A. Not having measured it I wouldn't be accurate, I might make a guess, I should say somewhere between 60 and 120 ft.
Q. From the South side of that crossing to the switch point?
A. Somewhere in that neighborhood.
Q. Now you say that crossing is just at the clear?
A. Yes sir.
Q. How far were you from that South crossing?
A. Myself personally?
Q. Yes sir, at the time you applied this emergency brake?
A. I can't say, for I don't remember exactly how we stopped.
Q. But you stopped it at once when you put it into emergency?
A. Yes sir.
Q. The train stopped still right where you applied the emergency?
A. As well as I remember, I think we finally backed up and cut the crossing after the emergency had been applied but I would not be positive about that.
Q. You don't know what they were doing at the head end, nor what signals were given at the head end?
A. No sir.
Q. Do you know where the conductor was?
A. No sir.
Q. Do you know where the head brakeman was?
A. No sir.
114 Q. When your train stopped there where did you go?
A. Explain please.
Q. Where did you first go when your train stopped on the siding?
A. I started up to the second crossing to cut it.
Q. How far did you go North of the first crossing before you applied that emergency?
A. I can't say, I remember that I was somewhere between the two crossings.
Q. Where were you when that train started backing?
A. Between the two crossings.
Q. How far from the South crossing?
A. I cannot answer it correctly at all, I was between the two crossings, that is the best answer I can give.
Q. What was the distance between the two crossings?
A. I should judge it to be somewhere between 400 and 500 ft., maybe 600 ft., that is just supposition.

Q. To the best of your judgment were you half way betweeen them at the time?
A. I won't be positive, it has been four years ago.
Q. As much as a third of the distance do you think?
A. Might have been.
Q. You think it probably as much as a third?
A. Might have been, and might not have, I won't say.
Q. How far had the train backed South before you applied the emergency?
115 A. As much as a half or three fourths of a car length.
Q. To refresh your recollection didn't it back as much as a car and a half?
A. Well I know it was backing up, I know I had to run to get to the rear end.
Q. You were up between the crossings and your caboose was just in the clear down at the South crossing, and you ran to get to the rear end?
A. Yes sir.
Q. And when you got there this train was going at what speed you say?
A. I can't say.
Q. Slow wasn't it, and the time that you stopped it with the angle cock it had not got to that crossing had it, it didn't block the South crossing?
A. I can't say positively whether it did or not, we were about the crossing, I can't say positively, I had nothing to impress it upon me at the time, and it is an occurrence that happens every day.
Q. You mean that the rear brakesman applies emergency like that every day?
Q. They do frequently.
Q. Do you mean to tell the jury that this is a daily occurrence?
A. Where it is necessary.
Q. Do you mean to tell the jury that it is necessary every day to apply the emergency?
A. There is never a day goes by that the emergency ap-
116 plication is not used.
Q. On every train on the road?
A. There is never a day goes by that the emergency application is not applied.
Q. On every train?
A. There is never a day that it is not applied.
Q. You mean that it is applied on some train every day?
A. Yes sir.
Q. Do you know how many trains on the road?
A. No sir.
Q. You say that there was nothing to impress that on your mind what occurred there?
A. No sir.
Q. It is just an ordinary occurrence?
A. No sir.
Q. Didn't Stewart tell you on that day that you hurt him?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal:—"We expect the witness to answer "He did"."

Q. If Stewart had told you on that occasion that you had hurt him, wouldn't that have impressed it on you as to what was done there?

(Objection sustained.)

117 Att'y for Pl'ff makes the following avowal:—We expect the witness to answer, "It would."

Q. Now you had that switch thrown for the main track?

A. Yes sir.

Q. 103 came while that switch was thrown for the main track?

A. Now I won't be positive about that, whether we backed up and sawed by for 103 I don't remember about that, the best I can say is I don't remember.

Q. The movement immediately preceding your lining that switch up for the main track, was after 115 had gone South?

A. Yes sir.

Q. That is straight track isn't it?

A. The main line is, yes sir.

Q. The side tracks are curved aren't they?

A. Oh, yes, as you enter them.

Q. They have to curve to get off the main?

A. Yes sir.

Q. Did you back your train out on to the main line at the South before 103 passed you?

A. If we backed out I don't remember anything about it.

Q. But after 103 passed you do remember backing out and leaving some cars on the side track and coming on North?

A. Bound to have done that.

118 Cross-examination by Jno. B. Rodes, of counsel for Def't:)

Q. Mr. Hill did you hear anything about anybody having been hurt there on that train until you got to Clarksville?

A. No sir, Clarksville is the first I knew of it.

Q. How far is that from Cumberland City?

A. 21 miles I believe.

Q. You were coming North I believe?

A. Yes sir.

Q. Now this is a rough diagram on the blackboard before you and the South end is near you, and the North end is toward me. When you first got there did you head in on that side track?

A. On what is known as the South switch, this end right here.

Q. When you got on it, did the side track hold your train?

A. As well as I remember, I won't be positive about this, but I think they pulled out just far enough at the other end to foul the main, 115 was standing on the main.

Q. When you say that you mean that the head car on the North end of the side track was a little out of clear?

A. That was just hear say on my part, I didn't see it.
Q. You can not see up at the North end?
A. No sir on account of this train standing there.
Q. And the North end couldn't see to where you were?
A. Not until after this train left.

Q. When you had pulled in and got on the side track,
119 where was the caboose?

A. Somewhere North of this crossing right here.
Q. I believe you said there were three crossings?
A. Yes sir.
Q. The first was down here at the South switch?
A. Just in the clear, what you mean by that is that a car on the siding and the car on the main won't touch.
Q. You have then got to run your train in on the side track, so as the caboose would just about go over that crossing, to get in the clear?
A. I think it has to get about over the crossing to be in good clear.
Q. In other words when your caboose was on the South side of the first crossing it would hang over so far that the train might hit it?
A. That is my impression of it, yes sir.
Q. When you ran in there, you ran in so far as to be over the first crossing with your caboose?
A. Yes sir, bound to have been over it.
Q. You gave Mr. Procter your judgment of how far from the point of the switch was the first crossing?
A. I gave him my best judgment possibly from 60 to 120 ft.
Q. What did you call the point?
A. At the switch stand where the lever works back and forth.
Q. Is there a switch stand that has to be operated to throw the switch?

120 A. Yes sir it stands four or five feet from the side of the track.

Q. How do you throw it?
A. Has to be unlocked, the lock taken off, the hasp raised and brought half way around.
Q. What have you got to unlock it with?
A. With a switch key. (Witness exhibits key.)
Q. Now the switch stand, which side of the track is it on going North?
A. On the right hand side going North.
Q. And right at the point of the switch?
A. Yes sir.
Q. What is the frog of the switch?
A. It is right there where the side track rail crosses the main line rail.
Q. How far is that frog from the point of the switch?
A. I couldn't say accurately.
Q. Give your judgment?
A. Between fifteen and twenty feet maybe, I won't be accurate on that.

Q. When your train came in you ran up until your caboose was just across that first public road there. Is that right?
A. Yes sir we cleared the road just a fraction.
Q. Where did you then go?
A. I started between this first crossing and the second
121. crossing up there. I started up to the second crossing to either watch it, or if anybody showed up there to cut it.
Q. When the train ran in did you do anything with the switch?
A. I threw it, lined it up for the main.
Q. You closed it?
A. Yes sir.
Q. How?
A. Closed it and locked it.
Q. Then what did you do?
A. Walked on up to this other crossing.
Q. Then what did you do?
A. Walked up to the second crossing.
Q. What for?
A. To protect the crossing, and to keep the cars from blocking it over a certain length of time, five minutes.
Q. What were you going to do there?
A. Cut the crossing if anybody showed up.
Q. In other words separate the train so as to leave a passage way?
A. Yes sir, cutting the cars.
Q. And you went up there?
A. That is where I started.
Q. You said the train started to back as you were going up there?
A. Yes sir.
Q. How far did it go before you applied the air valve in
122 the rear and stopped it?
A. I can't answer definitely, I don't remember.
Q. About how far?
A. It might have been half a car, and it might have been three fourths, I can't answer definitely.
Q. What was its position with reference to being in or out of the clear when you applied the air valve and stopped it?
A. That is another question I can't be positive about, but my judgment is, it was right about the first crossing.
Q. If it was right at or about the first crossing it was just in the clear, or possibly just out of the clear?
A. It might have been either one, I won't be positive about that. It was bound to have been right at the clear anyhow.
Q. And then it was you say you applied the air valve and stopped the train?
A. Yes sir.
Q. Now the train in backing up apast that switch, is there any rule as to whether or not that train should stop or not before it passed that switch?
A. If he wanted to back up there, it is duty to know——
Q. I am just asking you whether there is a Rule or not. I will show you a Book of Rules and ask you whether or not that was in force at that time by the L. & N. Railroad Company?

A. Yes sir, that is the Book of Rules.

123 Rule on Page 29, 117 (*a*) read in evidence by Att'y for Def't, which is as follows:— "117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to cloes a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and after, having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

Q. Is that the Rule to which you referred?
A. Yes sir.
Q. Was that Rule in effect in September 1908?
A. Yes sir.
Q. Was that train stopped by anybody but you in moving towards that switch?
A. No sir, I stopped that train.
Q. Did you do anything before you stopped that train?
A. I gave stop signals.
Q. Where were you when you gave them?
124 A. Standing in the middle of the main line.
Q. What sort of signals did you give?
A. Stop signal, in other words anything waved across the line is considered a stop signal.
Q. The regular stop signal known to railroad men?
A. Yes sir.
Q. Was that signal observed or obeyed by the engineer?
A. No sir.
Q. What did the train do, continue to back?
A. Yes sir.
Q. And your signal remained unobserved?
A. Yes sir.
Q. Did your engineer see them?
A. I can't say whether he did or not.
Q. What kind of space is that, a platform or anything?
A. The depot is at the North end.
Q. Do you know whether there were any people there or not?
A. I presume there was, Cumberland City like all other little towns, near the passenger time they all flock to the train.
Q. You do know that he continued to back after you gave him the stop signal?
A. Yes sir, kept backing up.
Q. Then when the train first got out of the clear, or just in the clear, at on near the first crossing, you applied the air and stopped him, why did you do it?

A. To keep him in the clear and to keep out of the switch
125 point before I could get to it.

Q. Could you have thrown that switch before you- train stopped?

A. It would have been a chance in me throwing it is all.

Q. Is there any Rule governing whether you shall throw that switch until the train stops?

A. The Rule says that the switch must be thrown when he starts back.

Q. Is there any Rule governing why?

A. He must know the switch is thrown before he starts backing up.

Rule 117 (*a*) read in evidence by Att'y for Def't as follows:—

"A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp."

Q. Now why did you stop that train?

A. To keep it in the clear, to keep it out of that switch at the same time.

Q. Just explain to the jury what would have resulted, your signal being unobserved or unobeyed, and the train continuing to back up, what would have resulted if you had not stopped that
126 train?

A. He would have backed through the switch points and ruined them and caused the Company to pay the cost of about $15.00 a point and probably the switch stand.

Q. State whether or not there was a possibility of derailing the train?

A. Yes sir very likely, I have often thought about it.

Q. Would there have been any property damaged if that train had continued to go back and cross that switch?

A. Yes sir the goose neck bent and the switch stand.

Q. And perhaps the caboose derailed?

A. Yes sir.

Q. Now on freight trains they have what is called the air brake?

A. Yes sir.

Q. And they had it on that train?

A. Yes sir.

Q. That air brake, is it not in the engine and in the caboose too?

A. The engineer has what is called the air brake valve in his engine.

Q. And it can be operated also in the caboose and on the rear of that?

A. Yes sir, they have what is called the conductor's valve on the inside of the caboose, and use what is called the angle cock on the rear end.

127 Q. What is that?

A. It is to automatically close the air at the end of each car. It is just the same as on the end of any box car.

Q. How do you use it?
A. Just by turning it.
Q. Is that the way you used it on that occasion?
A. Yes sir.
Q. Are there not usual, ordinary, customary jerks and jars, incidental and necessary in the operation of freight trains on railroads?
A. Every day.
Q. Can they be operated without them?
A. I don't see how they are going to do it.
Q. Is there any slack between the cars?
A. All the way, about a foot or a foot and a half of slack.
Q. In a train of 30 cars, about how much slack?
A. I suppose between 35 and 40 ft. of slack.
Q. In stopping trains, does that slack take up?
A. Yes sir.
Q. When you stopped it on that occasion was there any jerking and jarring?
A. There was none at the rear end; I don't know whether there was at the front end or not.
Q. Could there have been?
128 A. Might have been some slight jar.
Q. In your judgment would there have been any more than the usual and ordinary jerking and jarring of the train incidental to its ordinary operation?
A. I can't say how much there could have been.
Q. How long have you been a railroad man?
A. Between six and seven years.
Q. Now the air is more frequently applied by the engineer and from the engine than anywhere else?
A. Oh, yes.
Q. And when the engineer applies the air brake or the emergency brake state whether or not it is not felt more strongly in the rear than it would be in the engine?
A. It is a chance that way, but if we are sitting down we are always braced and watching for it.
Q. And such jerks and jars are usual and customary in the ordinary operation of trains on railroads?
A. Every day, every day.
Q. When you stopped that train on that occasion as you say to avoid injury to property you have mentioned it did take up the slack of the train?
A. Yes sir, it was bound to.
Q. In stopping and taking up the slack you prevented that damage you referred to?
A. I prevented him going out on the main and splitting the switch.
129 Q. And that also kept the train in or about the clear?
A. In or about the clear I won't be positive.
Q. Could you have hurried forward without stopping it and thrown that switch?

A. I might have and again I might not, it is a risk we take and so make ourselves liable for suspension.

Q. If you had failed to throw it what would have been the result?

A. I would have been liable for suspension; possibly from 15 to 25 days for being negligent.

Q. And the property would have been damaged?

A. Yes sir.

Q. At that time you believed that that was the wisest and safest way to prevent that property damage that you say was impending?

A. That was the only safe way that I saw, and I used it according to my best judgment.

Q. Is that why you did use it?

A. That was my best judgment.

Q. Did I understand you to say that the use of that air in the caboose, either in the caboose or on the rear of the caboose is a matter of frequent occurrence in railroading?

A. Yes sir, very frequent.

Q. In what different capacities have you worked in the
130 last six or seven years?

A. I started in as fireman first on the South end, and on account of ill health I quit and went to braking and then was promoted as conductor.

Q. Have you been running continuously?

A. With the exception of one or two months in the middle of the summer in dull business I am back to braking.

(Redircet examination by B. F. Procter, att'y for pl'ff:)

Q. When 103 passed you, your train was standing on the switch?

A. It was on the siding.

Q. It was standing still when 103 passed?

A. Yes sir, bound to have been standing still then.

Q. You don't know who gave the signal for your train to back?

A. No sir, do not.

Q. When your train passed on to the siding or headed into the siding, the switch was thrown by you at the South end?

A. Yes sir.

Q. You lined up for 115 to pass by?

A. Yes sir.

Q. Are you certain that there was any train there?

A. Yes sir.

Q. And you are certain that that train had gone South before 103 came?

131 A. Yes sir.

Q. You tell the jury that you might have gone ahead of your train and thrown that switch, but it would be taking chances on it, you might have failed?

A. Yes sir, I might have failed, any obstacle might have prevented my key from unlocking it. I have been over a minute and a half, three minutes, yes five minutes unlocking them.

Q. But you had just locked this one hadn't you, you had just unlocked and locked that switch?

A. Yes sir.

Q. You knew whether it was in good condition or not?

A. I started to answer that question, I have seen this switch in one minute after you unlocked it and took your key out, there is a little tongue in there that will fail to get in position very frequently, and you have to take it and knock it on the side to get it in place.

Q. If you had gone back and found the lock in that position what is the reason you could not have applied your emergency then?

A. Because he would have been so close on me I couldn't have had time.

Q. Did you attempt to go down and close that switch?

A. From where I was I didn't consider that I had time.

Q. You made no attempt to do it?

A. I left where I was and come to the South end, to the rear end.

132 Q. How fast was it going faster than you could run?

A. No sir.

Q. About how far had you gone, could you form an estimate?

A. I don't know.

Q. Was it going as fast as a man could walk?

A. I couldn't say about that.

Q. So you took no risk you knew that the emergency was very dangerous to the men on the train?

A. No sir.

Q. Isn't that the Rule that you shouldn't use it only for the purpose to protect life or property?

A. Yes sir.

Q. Isn't it made for the protection of the lives of the men on the train and the property in the train?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I don't read it that way. The Rule says to protect life or property and I applied it to protect property, not life.

Q. You are forbidden to apply the emergency brake except to protect property in the train or off the train—why is it made hazardous?

A. I consider it to mean life or property, and if I see any danger to this train approaching any obstacle that I see on the track
133 that I should think would derail my train, I should apply the air and stop it.

Q. You knew it was dangerous to the men on the train, and liable to break drawheads if you put that train into emergency?

(Objection sustained.)

Q. Isn't that true that it is dangerous to the men on the train and liable to break out drawheads and damage property on the train to put it into emergency?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. No I don't consider it so much so as to endanger life.

Q. Then why is it that you are forbidden to apply that emergency stop except to protect life or property?

A. Now these Rules are made and we work by them and very frequently take that book of rules and leave Bowling Green to go to Paris and work from here to Paris just by that and you would get to Paris next year sometime; there are some things in this book that we don't follow always and some we do follow.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

134 Q. You said something about going up there to cut the crossing?

A. Yes sir.

Q. Could you cut it until 103 passed?

A. I could have done it if I had room at the other end.

Q. But you didn't have room?

A. I didn't know it when I started up there.

Q. Wasn't that a straight track?

A. Yes.

Q. And didn't you know that you couldn't cut that crossing when you had to saw by 103?

A. I didn't know that.

Q. Don't you have to have signals to cut the crossing?

A. Yes sir.

Q. Don't you know if you take sidings temporarily that you don't cut the crossings?

A. If we are going to be there just a few minutes we watch the crossings, and if a man shows up we cut it.

Q. If he demands it?

A. Yes sir.

Q. And then in case of emergency you have a right to block it as long as necessary?

A. Yes sir.

Q. Then you cut it if you have occupied it longer than five minutes?

A. Yes sir.

135 (Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You had to wait here for 103?

A. Yes sir.

Q. And that necessitated the cutting of these crossings?

A. Yes sir.

Q. There are provisions there for that?

A. Yes sir we have to protect them.

Q. You spoke of the head end out here being out of clear as you are informed that could be true without any part of your train being off the siding at all?

A. Yes sir it could be out of the clear and still be on the siding.

Q. The whole train may be on the siding and yet be a little out of the clear and can be swiped?

A. Yes sir.

Q. And you knew nothing about this up here?

A. No sir.

Q. And you state that this book of Rules applied at the time of the occurrence which you have stated about, now I will ask you if these rules did not govern which I read. Rules 117, and 117 (*a*), which I will now read:

(Obj. to the reading of said rules by Att'y for Plaintiff, which is overruled, and to which plaintiff excepts.)

"117. Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen;
136 except where switch-tenders are stationed.

Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employe.

When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it.

117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

Q. Were these Rules in effect at that time?

A. Yes sir.

137 *Testimony of Dr. A. T. McCormack.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. How long have you practiced medicine?

A. Since the 12th of June 1896.

Q. You are a graduate of what school?

A. Medical Department Columbia University, New York City.

Q. From what other schools have you taken degrees?

A. Ogden College here and Bethel College, Russellville.

Q. Have you taken courses in other medical schools?

A. Yes sir, post-graduate in New York, Philadelphia, Chicago, and Rochester, Minnesota.

Q. Have you had any experience in surgery in any hospitals?

A. Yes sir at Bellevue, New York, and general surgeon at Paterson, N. J.

Q. Are you connected with a Hospital in the City of Bowling Green?

A. Yes sir, surgeon of St. Joseph's Hospital.

Q. What other experience have you had in the practice of medicine and surgery?

A. I have had considerable surgical practice.

Q. Did you assist in an autopsy on W. H. Stewart?

138 A. Yes sir.

Q. When was that?

A. I don't remember the date exactly, about four years ago.

Q. Who assisted in that?

A. Dr. Reardon, Dr. T. W. Stone, Dr. Huddle, and Dr. Meredith if I remember correctly.

Q. I will get you to tell the jury if you reduced to writing the result, and if so what you found?

A. It is always reduced to writing where it is held by more than one doctor. This is in Dr. Reardon's handwriting.

Q. What was the result of that autopsy?

A. If I remember correctly on the left side of his neck and shoulder there was a black blue place that showed it had been there for several days. The skull cap was removed and this whole section of the top of the head lifted off and the left side of the brain was adhered to the skull, when we opened the dura mater there are three layers of skin over the brain and when the outer layer was opened there was a large amount of floating serum that is not normally present in that position and it was adherent to the brain at two or three points, and the inner skin, peri mater, was thickened and congested and bloody and adherent to the brain tissues all along and in sections and both of the ventricles

139 or spaces in the brain were filled with clotted blood and the rest of the brain was perfectly normal, and our conclusion from that, I think probably Dr. Stone treated the case and gave the symptoms previous, and from the examination of the brain and the symptoms described by Dr. Stone we concluded that his death resulted from the injury to the side of his head or from a blow.

Q. Say that he struck his head against the side of his engine and he received this injury on September 5th and that afterwards he suffered from that injury from September 5 until you saw him at that time and he died on Sept. 27th, with his brain in the condition that you found it in and at the time that he received this injury he was in good health, what would you say was the cause of his death?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. It was unquestionably from the blow on his head.

Q. Could you tell that from the examination of the brain?

A. Yes sir, it could not be from anything else, if he had had meningitis it would have involved the entire brain or a disease that would produce anywhere in the neighborhood of his condition could only be caused by atronotism of some sort.

140 Q. What do you mean by atronotism?

A. A blow, an injury, a lick, or anything.

Q. You tell the jury that his death was caused by an injury to his head?
A. Yes sir, his death was caused by that.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

(Cross-examination by J. C. Sims, Att'y for Def't:)

Q. You had not been treating him?
A. No sir, I went to school with him but I never treated him.
Q. You never saw him until after his death?
A. No sir, I saw him at the undertaking establishment.
Q. And you say the only thing you saw was on the shoulder?
A. Yes sir the only thing outside, was on the shoulder.
Q. That was the only outward indication you saw?
A. Yes sir.
Q. You don't remember the date of the post mortem examination?
A. I can tell from this—September 28th 1908.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

141 Q. You say you went to school with him?
A. Yes sir.
Q. Tell the jury what kind of a man he was?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. You mean as to his habits?
Q. Yes.
A. I knew him well and he was a thoroughly decent fellow, and was perfectly healthy, he was built kind of a slim Jim like Mr. Rodes there, but he was always healthy, and as to his habits, his habits were good.

(Recross-examination by J. C. Sims, Att'y for Def't:)

Q. You say you went to school with him, you didn't go after he went to railroading did you?
A. No sir, I had treated his sister and other members of the family though, and knew him well.

Testimony of Dr. T. W. Stone.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
142 A. Bowling Green.
Q. What is your occupation?
A. Practicing physician and surgeon.
Q. You are a graduate of what school?
A. Vanderbilt Medical School.
Q. When did you graduate from Vanderbilt?

A. In 1893.
Q. What has been your occupation since?
A. Been practicing all the time since.
Q. How long have you lived in Bowling Green?
A. About sixteen years.
Q. How long did you know W. H. Stewart?
A. Possibly ten years.
Q. Were you his family physician?
A. I was.
Q. Were you called to see him any time about September 1908, if so, tell the jury what services you gave him and what treatment you gave him?
A. He came to my office in September, the 6th I think it was, 1908, complaining with his head and his shoulder and with a severe headache and soreness in his shoulder and head, and I prescribed for him then, and didn't see him any more for several days, and he came back to my office again still complaining the same way and the pain was possibly worse, still he had been at work since——

143 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

And I saw him no more until on the 23d I believe it was, and he then came into my office, and I found him with a temperature of 101 and he had Aphasia I thought, I forget the type of it, and he couldn't say what he wanted to say, tried to talk, and I told him to go home and go to bed, and I would call to see him, and his wife that evening called me and told me——

(Objection sustained).

She called me to see him then, I guess she had a reason for it, and when I got there I found that he was beginning to be paralyzed further than his tongue, and I prescribed for him again, and he still carried a temperature, and at night she phoned me again and he was completely paralyzed on his right side and he proceeded as a paralyzed man until his death, and carried a temperature during the whole time, and I think he died on the 27th of September.
Q. Did you insist in holding an autopsy?
A. I did.
Q. Tell the jury what you found his condition when the autopsy was held?
A. We found no trouble with any of his organs, the thoracic organs, lungs, heart, and bowels, were all right, but there was an old bruise on his shoulder which had gotten to a yellowish state at that time, and when we opened the head we found that the cover-

144 ing of the brain had been adhered to the brain substance, and if I remember right I think in the ventricle on that side there was some serum.
Q. Which side was it?
A. On the left.
Q. Where was the bruised shoulder?
A. On the left side.

Q. If paralysis ensued from that, which side was paralyzed?
A. It is owing to the position in the brain, but it is most often on the opposite side from the side of the head that is hurt.
Q. From the indication of his brain and the examination that you made there, tell the jury what caused his death?
A. He died from the injury.
Q. What injury?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. The injury to his head.
Q. What did he tell you about how he received that injury?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't
145 excepts.)

A. He told me on his first visit that he was down the road and stated the place.
Q. Just tell if he received any blow, tell what he said?
A. He said that he was thrown against the cab while at work in his engine.

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. Do you know how many days he was paralyzed before death ensued?
A. It was from the 23d to the 27th, that was five days, say into the fifth day.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When was the last time he was at your office?
A. The 23d.
Q. Where was your office?
A. At my residence on College Street.
Q. How far from where Mr. Stewart lived?
A. He lived on Clay Street.
Q. How far is that?
A. About six blocks.
Q. Do you know how he came to your office?
146 A. I do not, it seems to me that he rode in a grocery wagon, I wouldn't say for sure.
Q. When was he there before that?
A. My books show on the 6th and my recollection is that he was there one time between the 23d and 6th.
Q. Do you recollect the second time?
A. I do not know the date of it sir.
Q. So you only saw him three times from the 6th until the 23d of September?
A. Yes sir.
Q. And each time at your office?
A. Yes sir until the evening of the 23d I went to his residence.
Q. Doctor, the only external signs of injury was on the left shoulder at the autopsy?

A. No sir, the left shoulder was bruised, but the brain showed——
Q. I say external?
A. Yes sir, externally that was all I could see.
Q. Had you seen him before the 5th of September?
A. Often.
Q. Did you visit him while he was sick in the spring of 1908?
A. He had a spell of appendicitis and I don't recollect the
147 date.
Q. When was that?
A. I do not know, I could go to my book and tell you.
Q. Was it the same year?
A. I can't tell you.
Q. Do you recollect whether or not he had an attack of Lagrippe in the spring of 1908 and in bed about three weeks?
A. I didn't wait on him in an attack like that, I might maybe have visited him, if I had my books I could tell you.
Q. And you also visited him for an attack of appendicitis?
A. I did.
Q. Can you give the date?
A. No sir.
Q. How long was he confined with that?
A. To [illegible] bed possibly two weeks.
Q. I am going to ask you to get the date of that, bring your books?
A. Go now and get it?
Q. When you get through. Who was present at the autopsy?
A. Dr. Fred Reardon, Dr. McCormack, Dr. Meredith and myself.
Q. They are all physicians here?
A. They are.
Q. Do you know the railroad physicians here?
148 A. I do.
Q. None of them were present?
A. None of them. When we made the autopsy we were not thinking of this, we were aiming to get it before an Insurance Company in which he had a policy.
Q. In which he had a $5,000 policy for insurance?
A. I don't know about the insurance, but that is what they called for it for.
Q. He did have insurance?
A. Yes sir, but I don't know how much.
Q. Do you know whether that insurance was collected or not?
A. I heard it was is all.
Q. Do you know the amount?
A. No sir, do not.
Q. Were you informed of the amount?
A. Might have been told of it at the time but I don't recollect it.
Q. Isn't it your best recollection that it was $5,000?
A. I don't know sir.
Q. Will you bring your book over here with that portion of Mr. Stewart's account referred to heretofore?
A. Yes sir, I will bring it.

(Redirect examnination by B. F. Procter, Att'y for Pl'ff:)

Q. What was the condition of his health immediately pre-
149 ceding this injury?

A. Preceding it, it was good.

Q. Tell the jury whether or not he had entirely recovered from the illness in the spring?

A. He had. He had no trouble from his appendicitis, and the illness that the other side spoke of there was nothing left of that.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When was the last time that you had seen him prior to September 5th?

A. I can't tell you sir, I saw him often, we were close friends and he came to my office when he didn't need medical attention, and if I was at the depot and saw him I always went to him. I did his practice.

Q. When was the last time you made an examination of him before September 5th?

A. It seems that it was when he had appendicitis.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that he often came to you to talk about his little afflicted daughter?

(Objection overruled; to which Def't excepts.)

150 A. Yes sir, he had an afflicted little daughter and he often came to talk to me about her.

(Dr. Stone produces dates above referred to, and his examination is continued.)

(Recross-examination by Jno B. Rodes, Att'y for Def't:)

Q. Did you find the date when you treated Mr. Stewart for appendicitis?

A. Yes sir, in March of the same year, 1908.

Q. How many visits?

A. My first visit was on the 1st and my last visit on the 26th is what the books show.

Q. Isn't it a fact that physicians know very little about the human brain?

A. No sir, that is not true at all.

Q. And its operations and functions?

A. No sir.

Q. Do you know anything about how it operates?

A. Yes sir.

Q. Isn't it a fact that they know as little about the brain as any part of the human body?

A. I expect as to its operation it may be possibly true, anatomists forget it quicker than anyone else.

151 Q. Isn't it true that they know very little about it?

A. No it is not true.

Q. Isn't it a fact that they know very little about the nervous system and the condition of the brain?
A. It is not. They understand it.
Q. How does a man think?
A. I am not here to give you a lecture and that has nothing to do with this case.
Q. Do you know, doctor?
(Witness does not answer.)

(Dedirect examination by Mr. Proctor, Att'y for Pl'ff:)

Q. How many visits did you make in the spring of 1908?
A. The books show from the 1st to the 27th when he had appendicitis.
Q. Do you know how many visits you made there from the 1st to the 27th?
A. I would say about 25 visits, possibly, I didn't go every day towards the last of the sickness.

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. What is the name of the outer covering of the brain?
A. Dura mater.
152 Q. Is that next to the skull?
A. It is not only in some places.
Q. What is the name of the inner covering?
(Obj. by Att'y for Pl'ff. Obj. overruled; to which Pl'ff excepts.)
A. Peri mater.
Q. What is the name of the lobe of the brain on the right side of the head right up here?
A. I can not tell you sir.
Q. What is the name of the lobe on the left side?
A. The same thing except on different sides of the brain, I can't tell you the name just now.
Q. The brain is composed of convolutions, one folding into the other?
A. Yes sir.
Q. What are the functions of each one of them?
A. I can not tell you.
Q. Do physicians know the functions of each one of them?
A. They do.
Q. Do you know?
A. I haven't studied up on it recently and I can not tell you sir, they are located in different places and have different motions.

153 *Testimony of T. R. Neill.*

(Direct examination by B. F. Proctor, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Adams Street, 1011.
Q. How long have you lived here?

A. I have been in Bowling Green about thirty-five years I reckon
Q. How much of that time have you used in railroading?
A. About 28 years.
Q. In what capacity?
A. Braking and conductor?
Q. What character of trains did you brake on?
A. Freight train.
Q. How long?
A. About three years, two or three years I believe.
Q. How long did you act as conductor?
A. Well about twenty-five years I guess in all.
Q. And on what character of trains?
A. Freight and passenger.
Q. When did you quit railroading?
A. I think it was about six or seven years ago.
Q. On what division did you run?
A. Memphis Branch, between Bowling Green and Paris on freight, and between Bowling Green and Memphis on passenger.

154 Q. Are you familiar with the construction of the side track and buildings at Cumberland City?

A. Well, I was at the time, I don't know how it is now. At the time I was on the road I knew all the sidings.

Q. The operation of the trains at all sidetracks by signals and brakes are the same, in all side tracks and in all trains?

A. Yes sir, the same signals and rules.

Q. Are you familiar with the signals and rules for the operation of freight trains and the air brakes and signals in 1908?

A. Yes sir, I reckon I was, in 1908 I was not on the road then.

Q. Didn't the same rules as to air and transportation that were in effect when you left the road as there were in effect September 1908?

A. I think so, yes sir.

Q. The rules for the transportation department that were in effect when you left the road was the same as in 1908, isn't this the book of rules that went into effect in 1903, is that the book that was in effect then?

A. Yes sir.

Q. Now I show you a book of rules revised January 6, 1908 and will get you to examine and see if these rules for the use of the emergency were in effect in 1903, if that rule was in effect

155 at that time, on page 18, was that in effect at the time you last served?

A. I think this is the same rule as when I was on the road, I think that is the same in regard to the use of the air.

Q. Is or not the signals that were in effect for the operation of the trains and the same rules were in effect—you have stated that though.

(Obj. as to competency of said witness, by Att'y for Def't.)

(Examined by J. C. Sims, Att'y for Def't as to the voire dire:)

Q. You are in the coal business now?

A. Yes sir.
Q. How long have you been in the coal business?
A. Five or six years.
Q. How long since you were connected with the L. & N. Railroad?
A. I went into the coal business six or seven years ago.
Q. It has been about that long since you had any connection with the L. & N.?
A. Yes sir.
Q. And since that time you have made no effort to keep up with the rules of the Railroad Company?
156 A. Why, no, I haven't.
Q. That Book is Special Rules Governing the Use of Air brakes and Whistles, is it not?
A. Yes sir.
Q. That went into effect January 1908?
A. Yes sir.
Q. You have never had occasion to examine it closely?
A. No sir, only just from what I see.
Q. And that is just simply a momentary, casual examination, that you have made on the stand this morning?
A. Yes sir.

(Obj. overruled; to which Def't excepts.)

(Redirect-examination by B. F. Procter, att'y for pl'ff:)

Q. Say that a train was standing, a freight train was occupying the siding at Cumberland City for the purpose of letting a South bound passenger train pass and it was desired to have that freight train back South for the purpose of clearing the North end of the switch, and the engineer should give three blasts of the whistle indicating that he was going to back his train, what is the duty of the flagman upon the rear of the train provided that he has the switch thrown for the main track?

157 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

A. I didn't understand the question, what was the flagman's duty if he had the side track thrown for the train on the side track to back out, if the train is standing on the side track and the engineer whistles the back up signal, what is the duty then?
Q. Yes sir.
A. His duty is to throw the switch so they can back out, if the switch is not thrown. That is what I did when I was braking, is to throw the switch.

(Objection by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. You say that that is the duty of all brakemen and flagmen?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. I understand you that that is the duty of any flagman at the rear of the train under the circumstances which I have indicated?
A. Yes sir.

158 (Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

Q. What is the danger to the men on the train in applying emergency when a train is backing on the side track?
A. It could do a right smart damage I reckon, backing up and stopping it at a sudden stop like the emergency would, it is liable to knock the freight down and tear it up and I have known it to knock out draw-heads.

(Obj. by Att'ys for Def't to above answer. Obj. is overruled, to which Def't excepts.)

Q. Anything further?
A. I don't know.
Q. Any danger to the men, what is the danger to the men or property on the train?

(Objection sustained.)

Q. What other damages, if any, are liable to be done by applying the emergency?
A. Well, I don't know, it is owing to the position, I can't tell what could be the damage done, there is no way to tell until after it was done, I think it——

159 (Objection sustained.)

Q. In your experience as a railroad man tell what is the danger in applying the emergency when a train is backing?

(Objection sustained.)

Q. Now without pressing that question further, I will ask you if the engineer is backing his train in obedience to a back up signal from the front, and would it be proper railroading for the rear man, the flagman, to put that train in emergency, and under what circumstances should he put it in emergency, if at all?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: Witness will state "it would not be proper for him to apply the emergency, because he should open the switch."

Q. Isn't it true that if a brakeman under the circumstances named is within 100 or 120 ft. of the switch stand and the train is backing out slowly, that he could easily have beaten the train to the switch and thrown it after the train begins to back?

160 (Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to state that he could do so."

Q. At what distance from the switch stand could a brakeman precede an engine to the stand and throw it without stopping the train?

(Objection sustained.)

Q. Say that he was backing slowly?

(Obj. overruled; to which Def't excepts.)

A. It is owing to how swift the man went, if the train was going slow, if he went fast enough he could throw it, and if he didn't go fast enough he couldn't throw it. It would depend on the speed of both of them.

Q. What is the usual and customary thing for the flagman to do when the train is backing out at the usual rate of speed, what should the flagman do if the switch is not thrown?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the
161 witness to state, "He should go to the switch stand and throw the switch, and let the train out."

(Carlyle Tables of Mortality here introduced in evidence. And according to said tables of mortality, Kentucky Statutes, Page 1963, at the age of 34, the expectancy of years would be 31.68.)

Testimony of John Suttle.

(Direct-examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?

A. Woodburn.

Q. What is your occupation?

A. Merchandising, selling goods.

Q. Where were you raised?

A. Mostly in Warren County, in Richmond and Woodburn, and also in Tennessee.

Q. What experience have you had as a railroad man?

A. Seven years.

Q. Between what years?

A. I commenced work I think about May 1902 and quit about April 1909.

Q. Were you in the employ of the Company in September 1908?

A. Yes sir.

162 Q. Is this the Book of Rules in effect at that time?

A. I guess it is, you can tell from the date.

Q. What capacity did you serve in?

A. As brakeman and flagman.

Q. On what character of trains?

A. Freight.

Q. Are you familiar with the rules and customs governing the running of trains in 1908 and the rules governing the transportation department?

A. I was pretty familiar when I quit the road, I don't know that I can repeat the rules now.

Q. You were familiar with the way this switching was done?

A. Yes sir.

Q. Did you run between here and Paris at any time?

A. No sir

Q. You are not familiar with the side tracks at Cumberland City?

A. No sir.

Q. Say that Cumberland City has a side track, and a North bound freight took the siding there for the purpose of letting a South bound passenger train pass going in an opposite direction, and after the South bound passenger train had passed, the switch at the South end was closed, and the siding was not sufficient to cut or clear the entire freight train, and it was necessary to back the train from the North towards the South, and the engineer had received the signal and answered that signal with three short blasts of his whistle,
163 was that the proper signal that he was going to back up?

(Objection by Att'ys for Def't for the reason that there is no question raised as to that. Obj. sustained.)

Q. Then if that signal had been given what was the duty of the flagman to the rear, in the event that he had his switch closed to the rear and the engineer had answered that signal to back slowly?

(Obj. by Att'ys for Def't. Obj. overruled; to which Def't excepts.)

And the South end was in the clear but it was necessary to back it in order to clear the North end of the siding?

A. And the engineer gave three blasts of the whistle, what is it you want to know?

Q. I want to know what is the duty of the flagman or brakeman?

A. It was his duty to open the switch and give the signal to back out.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. You are familiar with the use of the emergency brake are you not?

164 A. Yes sir.

Q. If that train under the circumstances mentioned had begun to back slowly, and the emergency brake had been applied, what danger would there be in the application of the emergency under such circumstances, to the men on the train or the property on the train, if any?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. Well the emergency usually causes considerable jar or shaking up of the train.

(Cross-examination by Jno. B. Rodes, att'y for def't:)

Q. You are familiar with the rules are you, as in all cases where danger of damage or injury to life or property where the application of emergency is proper?

A. Where it is necessary.

Q. And under any circumstances where that occurs, then the emergency may be used?

A. If there is danger to them, yes sir.

Testimony of Capt. George James.

(Direct-examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?

A. Bowling Green.

165 Q. How long have you resided here?

A. About thirty years.

Q. What experience have you had during that time as a railroad man?

A. About twenty-five years.

Q. In what capacity and for what railroad?

A. Brakeman, baggage man, and conductor, L. & N. Railroad.

Q. Are you familiar with the road between this point and Memphis?

A. Slightly familiar, it has been a long time since I was on the Memphis line.

Q. When did you quit the service?

A. In 1904 or 1905, I think in 1905.

Q. Are you familiar with the signals or use of the air brake say in 1908 and the proper way in which to manage and control trains under the rules and customs of the L. & N. Railroad Company?

A. I remember very distinctly the use of the air and its applications during the time I was on the road, but I was off the road before 1908.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Examine Rule on page 18 and see if that Rule was in effect in 1905?

166 (Witness examines Rule.)

A. Yes sir.

Q. I will show you Book in 1903, revised and reissued in 1907, was that book of rules in effect at that time?

A. If it was not revised until in 1907 it was; yes sir.

Q. Now I will get you to state Captain, taking it that a freight train has headed in on the siding at Cumberland City for the purpose of letting a South bound passenger train pass and the train is in the clear at the South end, and clear of the main track, but it is not in the clear at the North end and it becomes necessary to

back the train in the siding for the purpose of clearing the North end and the engineer in obedience to a signal is backing his train, and has given three short blasts of his whistle indicating this, what would be the duty of the flagman under the circumstances, in the rear of that train?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. The flagman if it wouldn't clear at the North end, would have to go to the South end of the switch, open the switch and permit the train to run down sufficiently on the main line of the track to clear the North end.

167 Q. When he hears this signal given by the engineer what is his duty when it is going to back?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. He should have gone to the switch in obedience to the three whistles by the engineer and opened the switch so as the train could go on the main track and clear the North end.

Q. After the signal has been given, say the engineer starts backing and gets, say within 100 feet of the switch and he was backing slowly as is usual and customary, would there under such circumstances be any necessity for the flagman to put that train into emergency to stop it to keep it from going through that switch?

(Objection sustained.)

Q. Captain, say under the circumstances that I have mentioned the rear of the train is backing, the whole train is backing, and the rear, which is the caboose, is in 120 ft. of the switch at the South end, and is backing slowly as is usual and customary, and a brakeman or flagman has his South switch closed, what should he do under such circumstances?

168 (Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. As I stated a while ago when there was a signal given by the engineer to back up, under the circumstances you have stated, it would be his duty to go open the switch so that the opposing train could come down.

Q. Say he hadn't done that and he was at the South end of the train towards the caboose, and it was backing slowly, and the switch was closed, what was the duty of the brakeman then?

(Objection sustained.)

Q. Say that a train was going slowly as is usual and customary, and that the brakeman had let the train get within 100 or 120 ft. of the switch, and the train slowly backing, as is customary, what should that brakeman do if the switch was closed?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect him to answer: "He should have gone ahead of the caboose and thrown the switch."

Q. Say under the circumstances named a train is backing in obedience to a back up signal, having given three blasts in
169 answer to this signal, and it is going slowly at a rate that a man could outrun the train and reach the switch before the train could get there, what was his duty to do there, should he have applied the emergency, or should he have gone ahead and thrown the switch?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect him to answer that "he should leave the train and run ahead of it and throw the switch."

Q. Saying that his train had only gone back a half car length or a car length, a train of 25 or 30 cars or more, and having only gone that distance, and was moving back slowly in obedience to this back up signal, and the brakeman was at the rear of the caboose what should he have done?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. If the train had just started and had only proceeded one car or one-half car length, it would not be going I presume more than 1½ miles or 1 mile per hour, a man should be able to run and get the switch open easily before the train could get to the
170 switch block.

(Obj. by Att'ys for Def't. Obj. sustained, as the question is what should he have done.)

Q. What should he have done under the circumstances named?

A. He should have gone to the switch and lined it up for the moving train.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You said you had not railroaded any since 1905?

A. That is my recollection.

Q. You were passenger conductor then?

A. Yes sir, at that time.

Q. And you had been a passenger conductor for 20 years?

A. Yes sir, eighteen or twenty somewhere along there.

Q. And you had not run on a freight train for 25 years had you?

A. No, up to the time I quit I hadn't.

Q. You haven't had a position on a freight for twenty-five years?

A. Only as flagman, I have flagged on a freight since I run on a passenger train.

Q. On the L. & N. Railroad?

A. On the L. & N., on the Knoxville & Atlanta, via Blue
171 Ridge.

Q. How long did you flag?

A. Not very long.

Q. How long?

A. Possibly two or three weeks.

Q. Outside of that you have had no experience on a freight for 25 years?

A. No sir.

(Att'ys for Def't move the Court to exclude the testimony of Capt. James from the jury, which is overruled by the Court, and to which Def't excepts.)

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Aren't the same rules governing the operation of freight trains the same as for passenger trains?
A. Yes sir, with reference to all signals.
Q. And with reference to emergency?
A. Yes sir, with reference to emergency, and with reference to the application of all signals.

(Recross-examination by Jno. B. Rodes, Att'y for Deft:)

Q. Does a passenger train run like a freight, isn't there a great deal of difference in their operation?
A. You will have to be more explicit.
Q. In their jerking or jarring?

172 (Att'ys for Def't again move the Court to exclude the testimony of Capt. James from the jury, which is overruled, and to which Def't excepts.)

Q. You say in all cases where there is danger to life or property emergency may be used?
A. Yes sir.
Q. Were you also familiar with Rule 117 (*a*) where a train about to leave a siding must come to a full stop before the switch is thrown and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. Are you familiar with that rule?
A. Yes sir.
Q. And that was the Rule and prevailed at that time?
A. Yes sir.

Testimony of Will Hagan.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. In Bowling Green.
Q. How long have you lived here?
A. Often and on all my life.
Q. What experience have you had in railroading?
A. Right at twenty years' experience.
Q. In what capacity?
A. Brakeman, switchman and flagman.
Q. Did you ever run between here and Paris, Tennessee?
173 A. Yes sir.
Q. How long?
A. I broke about eighteen or twenty months, and I flagged about a year and a half.
Q. You have had about how many years' experience in all?

A. Something like twenty years.
Q. When did you last work for the L. & N.?
A. It has either been five or six years ago.
Q. Did you ever work for any Company besides the L. & N.?
A. Yes sir.
Q. What other Company?
A. Iron Mountain.
Q. Are you or not familiar with the Rules governing the use of air and air brakes and the transportation department of the L. N. in effect in 1908?
A. Yes sir.
Q. Have you at any time gone on the ground at Cumberland City and made any measurements to ascertain the distances between any points there?
A. Yes sir.
Q. When was that?
A. Last Friday.
Q. How far is it from the switch point at the South of that siding to a point North of the switch point where cars would be in the clear?
A. 110 ft.

Q. How far is it from the switch point at the South end to
174 the road crossing the first upon that siding as you come North?
A. Where you first hit the crossing?
Q. Yes sir.
A. I never measured that but it is something like 120 ft.
Q. How wide is that crossing?
A. Something like ten feet or more.
Q. What is the condition of that main track there, is it staright or curved between the switch points, the North switch and the South switch at that siding?
A. Almost straight, nearly straight, the main track of course is a little crooked where the siding comes in.
Q. The North switch and the South switch, what is the condition of that main line?
A. Straight.
Q. Did you assist in making any photographs on last Friday down there?
A. Yes sir.
Q. I will get you to examine photograph- No. 1, 2 and 3 and will get you to state if they are true and correct photographs of that track there, and if they were made at that time?

(Plaintiff here offers said photographs in evidence.)
(Obj. to introduction of said photographs in evidence by Att'ys for Def't which is overruled, and to which Def't excepts.)
175 Said photographs are here filed, marked 1, 2 and 3, and are hereto attached.

Q. No. 1, what does that photograph represent?
A. That is the South end switch.
Q. No. 2, what part of the track does that indicate?

A. That is up nearer the passenger depot, that is in the middle of the side track, the main track.

Q. Where was the camera sitting when that was taken?

A. Up near the tool house.

Q. Let me call your attention to No. 2 isn't it true that that was sitting up near the North switch looking South and taking in the depot?

A. Yes sir, that is right.

Q. Now No. 3, what is that a photograph of?

A. This is the middle picture, the middle section.

Q. Where did you set the camera there?

A. Set it near this switch point here, near the section house there.

Q. Is that section of the track taken looking North or South from that point?

A. It is taken from the North looking South.

Q. Say that a North bound freight that was so long that the siding at Cumberland City would not clear it at both ends took the siding there, and it was necessary for 103 to pass it, and the South end of the train was in the clear, and it was necessary to back the train upon the siding in order to clear the North end so that 103 could come in for the purpose of sawing by, and the engineer was backing
176 in obedience to the back up signal, and had given the back up signal of three short blasts of the whistle, and had begun to move slowly, and had moved over one half of a car length, and the flagman at the rear had done nothing to stop that train at all until it got within 120 ft. or to that railroad crossing, which you say is about 120 ft., and he was at the rear of that train at the caboose, and the South switch was set for the siding, what ought that flagman to do?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def'ts except.)

Q. Just give his duties when the signal was blown first?

(Objection sustained.)

Q. Answer the first question.

A. If I understand it it was when the train was backing and he was at the rear end of that train at the caboose and the switch was set for the side track or the main track?

Q. It was setting for the main track, it was closed against the siding.

A. Do you want me to say what would be proper to do?

Q. Yes sir.

A. Why, open the switch and let the train back on up.

177 Q. What should he have done as soon as those signals were given, after the train was going to back?

A. Should have opened the switch and let his train back on up into the clear so the passenger train could get in from the North end.

Q. Are you familiar with the danger or the effect of applying the emergency on a freight train when backing?

A. With the conductor's valve, or angle cock?

Q. Well either one, say the angle cock, or the conductor's valve?

A. The angle cock if you open it wide open it would make a terrible jar, it would be dangerous to a man on top of a car or in the engine, or to a car of stock or anything, if you get hold of it and open it around it would make an awful sudden stop, it would just stop right there, just give a terrible jerk.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Is there any way to avoid putting on that sudden stop and stopping the train, if so, how?

A. Yes sir, if a man should take the valve and let the air out, just turn it that way and right back he will set the brakes and let the air out.

Q. What about it in emergency?

A. It just slaps the brakes on right at once with all the force the train has got on each and every car equipped with air.

178 Q. Is it proper railroading under such conditions as we have named for a flagman to apply the emergency?

(Obj. by Att'ys for Def't. Obj. overruled by the Court, to which Def't excepts.)

A. I consider it a very dangerous proposition when a man angle cocks a train, to the train, or whoever is in it.

Q. What if he could not get back to that switch in time and throw it, and it is either necessary for him to angle cock the train and put it into emergency or let the train go on through the switch, then what should he do?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. It would be safer to the people on the train, and to the train, to let him go through the switch.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. Have you ever seen trains run through switches and are you familiar with the effect upon the switch to let the train run through?

A. Yes sir.

Q. Did you examine that switch point when you were there?

179 A. Yes sir.

Q. How long is that switch point?

(Objection sustained.

A. I know the standard of switch points.

Q. Is there any evidence that they are the same length?

(Objection sustained.)

Q. You saw that switch point down there?

A. Yes sir.

Q. In the event that that train had gone through that switch point and had gone through the switch, what would have been the effect?

A. It would have sprung the switch points, and gone on through the switch points.

Q. In order to repair it, what is necessary to do?

A. I have never repaired a switch point, but I have fixed them after we have run through them.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How do you do it?
A. Take a spike and spike maul and spike the switch down for the rail of the main track.

180 (Cross-examination by Jno. B. Rodes, Att'ys for Def't:)

Q. To what extent have you been assisting Mr. Procter in this case?
A. Not to any extent, Mr. Procter asked me to go down there.
Q. To what extent have you been working for him in this case?
A. I have been working for Mr. Procter.
Q. What did you go down there for?
A. He came and asked me to go down with him.
Q. How long did you spend there?
A. Two days.
Q. Haven't you been up in the Court room repeatedly talking to him about this case?
A. I have been here once.
Q. Wasn't you here yesterday morning?
A. I was summoned here yesterday morning.
Q. Wasn't you here before that?
A. Yes sir, I was once before.
Q. Wasn't you talking to him then?
A. He came to me and was talking to me.
Q. Wasn't you assisting him?
A. No more than I would any other man.
Q. When did he first come to you and want you to go with him down there?
A. Thursday morning.
Q. Do you know how he came to go to you to get you to go?
181 A. I do not, I don't know how he came to have me summoned.
Q. Are you familiar with the rule that neither this angle cock or conductor's valve should be used except in cases of emergency, are you familiar with that rule?
A. Yes sir.
Q. That is the rule?
A. Yes sir.
Q. And was the rule in 1908?
A. Yes sir.
Q. How long since you worked for the L. & N.?
A. Right at five years ago, at Evansville, Indiana.
Q. What were you doing there?
A. Switching, and I broke part of the time.
Q. Where did you brake?
A. From Howell, two ways out of there.
Q. For how long?
A. About three months and then went to switching.

Q. On the L. & N.?
A. Yes sir.
Q. When had you railroaded before that?
A. Something like a year before.
Q. Where then?
A. Right here in the Bowling Green yard.
Q. How long did you work there?
A. The first time I worked about four years switching in the yard.

182 Q. What had you done before that?
A. Had broke down the Memphis Branch, and flagged down the Memphis Branch.

Q. So up to five years ago for several years you had done no railroad work except switching in the yard here, and switching at Evansville, and doing a little work for two or three months out of Evansville?
A. What is the question?
Q. Since switching down here, was about nine years ago wasn't it?
A. Eight years ago.
Q. Since that the only work on the railroad you have done is to work a few months out of Evansville?
A. No sir, I have switched and broke both, but not for the L. & N.; the last work I did for the L. & N. was at St. Louis.

Question by Juror, Chas. Rogers: I would like to know the distance from the clear to this side track here, to this first frog, you say it is 110 ft., is this the switch point? A. Yes sir, 110 to the clear. Q. How far is it from the frog to the clear? A. I never measured it. Q. Is there any way to find out? A. It is 40 inches from the outside rail to the other outside rail, but from this frog here I don't know how far.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

183 Q. To refresh your memory isn't it——

(Objection sustained.)

Q. To refresh your memory, you say you took this photograph from a point South of the switch point?
A. Yes sir.
Q. This one?
A. Yes sir.
Q. Now did you or not take the measure from that frog to the point of clearance, which is 40 inches?
A. Yes sir, it is 40 inches to the clearance.
Q. Now to further refresh your recollection isn't it 34 ft. from the clearance to the switch board?
A. I don't remember.

Testimony of JOHN SHARPE, recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Captain Sharpe, you were upon the stand yesterday afternoon, and were asked whether or not there had been any change in the Rules and the use of the air signals and of the government of trains by the air brake since you were in the service of the railroad company, say in 1898 I believe it was you quit?

A. 1897.

184 Q. Have you examined the book of rules since that time to see if there was any difference in the rules governing the air brakes and the signals?

A. Yes sir, I examined it last night.

Q. Are they the same?

A. Just the same, see no difference at all.

Q. If a North bound freight train takes the siding at Cumberland City, to let the South bound passenger train pass, and the freight train is so long that the siding won't clear it at both ends, and the train is in the clear at the South end of the siding, and it becomes necessary to back that train upon the siding to clear the North end, so that 103 can pass by, and the flagman has set his switch for the main line against the siding at the South end, and the engineer in answer to the back up signal is backing South slowly, having given the three blasts of his whistle indicating that he was going to back up slowly, and it has moved a distance of about a half a car or a car length, what is the duty of the flagman in the rear when he hears this back up signal given?

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

A. Well, it is his duty to go to the switch and be ready to throw it if the caboose gets near enough on the switch.

Q. Say he was at the caboose?

A. The flagman should not be at the caboose, knowing that

185 the other end is not clear, he should have been at the switch.

(Att'ys for Def't move the Court to exclude the above testimony from the jury, of Capt. Sharpe, which is sustained.)

Q. Say he has got his switch set for the main track, and hears this back up signal given, and the train starts backing what is his duty to do when he hears that signal given?

A. I think I have answered that the only thing for him to do is to look out for the hind end and to throw the switch if it is not long enough to hold it in the side track.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. When you were railroading was this Rule 117 (*a*) in force, "that a train about to enter or leave a siding should come to a full stop before the switch was thrown?"

A. Yes sir.

Q. It it didn't come to a full stop before the switch was thrown, it was the duty of the flagman to signal to stop it wasn't it?

A. To see if he could get the switch open, it would be going against the Rule for them not to stop so he could open the switch, backing out of the siding though it is different.

186 Q. Rule 117 (*b*) is "Running switches should not be made," isn't it?

A. Yes sir, but when they want to get out they are bound to back.

Q. But when they are backing it should come to a full stop before the switch is thrown—was that Rule in force?

A. Yes sir, it was in force.

Testimony of Miss Fannie Reddin.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Paris, Tennessee.

Q. How long had you known W. H. Stewart?

A. About four months I think before he died.

Q. Did he stop at the place where you were living, where did you know him?

A. He came to our place to board in June before he died.

Q. What place was that?

A. At my sisters at Paris, in the Boothe Boarding House.

Q. In September that he is said to have been hurt?

A. Yes sir.

Q. What was his condition?

A. He complained of his head hurting him.

(Objection by Att'ys for Def't.)

Q. What was his condition?

187 A. He didn't seem to be well after he was hurt.

Q. Do you know of him taking any medical treatment there?

A. I gave him morphine to ease his head.

(Obj. by Att'ys for Def't. Obj. overruled, to which Def't excepts.)

Q. How long before he died?

A. I don't know whether it was next to the last trip or the last trip.

Q. How long before you heard he was dead, after he came home?

A. It was not long, just a little while.

Testimony of Mrs. Lon Hightower.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. On Clay Street.

Q. You are the wife of whom?
A. Lon Hightower.
Q. How far do you live from Mrs. W. H. Stewart?
A. Two doors.
Q. Did you know her husband, W. H. Stewart?
A. Yes sir.
Q. For how long before his death?
A. For ten years.
Q. Did you visit him just before his death?
188 A. Yes sir.
Q. Tell the jury in your own way his condition when you saw him from the time he came home?
A. He was complaining from the time he got hurt until his death.

(Objection sustained.)

Q. Just tell from his appearance what was his condition?
A. He was paralyzed.
Q. How long did that paralysis continue before his death?
A. Several days.

Testimony of Mrs. Sherrell.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Are you the mother of W. H. Stewart?
A. Yes sir.
Q. Where were you living at the time of his death?
A. Here in Bowling Green.
Q. Did you see him when he was said to have been hurt and prior to his death?
A. Yes sir.
Q. Tell the jury whether or not you were there when he died?
A. Yes sir.
Q. Was he paralyzed before his death?
A. Yes sir, for several days.
189 Q. Could he talk?
A. No sir.
Q. Where are his little children?
A. One of them is at school, and two at home.

Testimony of T. A. SORRELLS, recalled for further cross-examination, to which Att'y for Pl'ff objects, which is overruled, and to which Pl'ff excepts.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You stated upon your examination that in the various trips after September 8th that you made with Mr. Stewart of which the cards show, and to which you testified to didn't you?
A. Yes sir.

Q. On any of these trips did you hear anything about his injury or any complaints made by him?

A. He never made any to me about it?

Q. You were his fireman and in the same cab with him?

A. Yes sir.

Q. Mr. Sorrells, in September 1908, was there a Rule of the Company involving the use of the conductor's valve or the valve in the rear of the caboose, in what cases it was to be used, and the angle cock?

A. Yes sir, the conductor's valve.

Q. I will ask you whether or not this rule was in force at that time, page 8, from the Special Rules Governing the use of Air
190 Brake and Whistle Signals, Revised January 6th 1908. I will read Rule as follows: "The train line valve must always be applied on freight trains, but neither this nor the conductor's valve must be used, except in cases of emergency, and when so used must be held open until the train stops, and then closed. If conductor's valve can not be reached, open cock in the rear. In using the air signal, pull directly down on the cord during one full second for each intended blast of the signal whistle, and allow two full seconds to elapse between the pulls. For trains of exceeding eight cars, this time should be lengthened in proportion. On account of the different location of the conductor's valve in sleepers, private cars, and equipment of various roads, trainmen should ascertain their location as soon as possible after taking charge of a passenger train. On our own equipment the handle must never be placed inside of a closet, but at a point where it will be accessible from the body of the car." Did that Rule apply at that time?

A. Yes sir.

Q. State whether or not if the angle cock is used to stop a train, how it must be used?

A. It must be left open until the train comes to a stop.

Q. Is that used in Emergency?

A. Yes sir.

Q. And held wide open until it comes to a stop?

A. According to the Rule that is the way it should be used?

191 Q. Couldn't you make a service application by the use of the angle cock?

A. There is no way of making a service application with the conductor's valve.

Q. Who can make it?

A. The engineer.

Q. He can draw off 10 lbs. of air, and if he wants to further slow the train he can draw off as much as necessary?

A. Yes sir.

Q. Can that be done with the angle cock?

A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Couldn't a brakeman bleed off the train line and apply the brakes gradually with the angle cock?

A. I don't know what a brakeman can do.
Q. You don't know then?
A. I don't know whether he can or not; they have bleeder cocks, but not for that.
Q. If the slack is bunched in a train by the emergency application, won't the air bleed off and let the slack run out again?
A. Not if you left the conductor's valve open it won't.
Q. Do you mean to say that if you leave the conductor's valve set the air would remain in the cars?
A. I don't suppose it would unless it leaks in some of the
192 train lines.
Q. How do you release the brakes when you go into emergency?
A. By closing the conductor's valve if he uses it, and if the engineer uses it he releases the brakes.
Q. When you do it with the angle cock?
A. You have to close it before it will pump up.
Q. How long would it take you to pump up that air?
A. It is owing to the condition of the train line.

(Recross-examination by Jno. B. Rodes, att'y for def't:)

Q. Where is it pumped up from?
A. From the engine.
Q. He spoke of bleeding something, you have bleeding cocks on the train for that?
A. Yes sir on the cars.

Testimony of O. L. Hill, Recalled for Further Cross-examination, to which Att'y for Pl'ff Objects, which is Overruled, and to which Ruling Pl'ff Excepts.

(Cross-examination by Jno. B. Rhodes, att'y for def't:)

Q. Mr. Hill, you applied the emergency on there with the air valve in the rear of the caboose, with the angle cock?
A. Yes sir.
Q. Can the angle cock be used for any other purpose than applying the emergency?
A. Only in coupling the train.
193 Q. Can any service application be made with it?
A. No sir.
Q. Can the engineer make a service application and slow down?
A. Yes sir in his cab.
Q. Can that be done with the angle cock?
A. No sir.
Q. Are you familiar with the Rule under which the angle cock may be used in cases of emergency and held open until the train stops?
A. I don't know what page, but I am familiar with the rule.
Q. Is that what you do?
A. Yes sir.

Att'ys for Pl'ff move the Court to exclude this testimony of O. L. Hill from the jury, which is overruled, and to which Att'ys for Pl'ff except.

(At the close of all of Plaintiff's testimony, the defendant moved the Court to peremptorily instruct the jury to find a verdict for defendant, which is overruled by the Court, to which ruling Defendant excepts.

194 COMMONWEALTH OF KENTUCKY,
County of Warren, sct:

I, Belle Galloway, Official Stenographer for the Warren Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected and all exceptions, objections and avowals, concerning the same, as well as all papers and exhibits offered to be or used as evidence in said trial.

Witness my hand this June 17, 1912.

BELLE GALLOWAY,
Official Stenographer,
Warren Circuit Court.

Examined, attested and approved this November 8, 1912.

McKENZIE MOSS,
Judge Warren Circuit Court.

Stenographer's Fees:

Attendance.....	$10.00
Transcript.....	46.80
	$56.80

195 The following is a copy of the order filed in the County Court on the 10th. day of October, 1908 with the above affidavit:

At a Called Term of the Warren County Court, Held in and for Warren County on the 10th Day of October, 1908.

Present, Hon. Chas. Drake, Judge, presiding.

On motion, it is ordered that Jeanette Stewart be and is appointed administratrix of the estate of W. H. Stewart, deceased.

Thereupon came said Jeanette Stewart into open Court and executed bond to the Commonwealth of Kentucky, conditioned as the law requires with Sarah Sherrell as surety thereon, the Court filing the liability of said surety in the penal sum of $125.00, which said bond is accepted and approved by the Court; and thereupon said Jeanette Stewart took the oath as the law directs.

A copy attest:

E. C. SMITH, *Clerk.*
D. C. GARVIN, *D. C.*

The following is a copy of the supersedeas bond executed in office 23 day of November, 1912:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
WM. H. STEWART'S ADM'R'X, &c., Appellee.

Upon an Appeal from a Judgment of the Warren Circuit
196 Court Rendered 12th Day of April, 1912.

Whereas, said appellant, Louisville & Nashville Railroad Company, — an appeal from the judgment of the Warren Circuit Court, rendered at its April Term, 1912, against it in favor of the appellee, for the sum of $20,000.00 (twenty thousand dollars) and costs and appellant desires to supersede the whole of the judgment above mentioned;

Now, we, Louisville & Nashville Railroad Company, principal, and Citizens Trust & Guaranty Co. of West Va., surety, do hereby covenant to and with the appellee, Wm. H. Stewart's Adm'r'x &c. that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of the judgment above stated, in the event that it should be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the whole of the judgment aforesaid.

Witness our hands, this 23rd. day of November, 1912.

LOUISVILLE & NASHVILLE RAILROAD CO.,
CITIZENS TRUST & GUARANTY CO. OF WEST VA.,
By JAMES C. SIMS, *Att'y-in-Fact.*

The following is a copy of the power of attorney attached to said bond:

Citizens Trust & Guaranty Company of West Virginia, a corporation, organized under the laws of the State of West Virginia, with its principal office at Parkersburg, West Virginia, and duly licensed and authorized to become surety on bonds within the Commonwealth of Kentucky, hereby makes, constitutes and appoints James C. Sims and John B. Rodes of Bowling Green, Kentucky, its true and lawful attorney- for it and in its name to sign, seal and deliver
197 a certain supersedeas bond for the Louisville & Nashville Railroad Company, to be given in the Warren Ciruit Court in the case of William H. Stewart's Adm'r'x vs. Louisville & Nashville R. R. Co. hereby ratifying and confirming all and singular the actions of the said attorney'-in-fact in and about the execution and delivery of said bond, to all intents and purposes the same as if said bond had been executed by the proper officers of the said Guaranty Company at its Home office. This power of attorney is to be attached to or filed with said bond when so executed.

In testimony whereof, the said Guaranty Company has caused its corporate name to be signed hereto and its corporate seal to be affixed hereto and attested by its proper officers thereunto duly authorized, this 29th day of May, 1912.

CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,

[SEAL.] By W. G. PETERKIN, *President.*

Attest:

J. W. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To-wit:

I, J. L. Knapp, a Notary Public in and for said County
198 do certify that W. G. Peterkin, personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the President of Citizens Trust & Guaranty Company of West Virginia, the corporation described in the writing above bearing date the 29th day of May, 1912, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that the seal affixed to said writing is the corporate seal of said corporation and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the said W. C. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this 29th day of May, 1912.

[SEAL.] J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

Financial Statement of the Citizens Trust & Guaranty Company of West Virginia as of June 30, 1912.

Company began business July 31, 1899.

Assets.

Real estate Home office	$49,000.00
Real Estate other than home office	28,223.96
Furniture and fixtures	450.00
Railroad and other bonds	392,934.70
Bank stocks	29,500.00
Other stocks	27,000.00
Cash in banks and home office	27,675.66
Premiums due for bonds written	31,190.24
Loans on mortgages	18,479.71
199 Loans on Collateral	7,100.00
Time Loans	1,040.10
Other assets	21,200.76
	$633,795.13

Liabilities.

Capital stock paid in cash	$400,000.00
Surplus	100,000.00
Undivided profits	23,302.51
Reserve or unearned premiums	50,000.00
Reserve for possible losses	50,670.00
Reserved for incidental expenses, bills not received	850.00
Accounts payable	972.62
Dividend No. 29	8,000.00
	$633,795.13

Dividends.

Date of last declaration, June 1912.
Date payable, July 1, 1912.
Amount, $8,000.00.
Total dividends paid to date, $231,000.00.

We, W. G. Peterkin, President, and J. H. Knapp, secretary, of the Citizens Trust & Guaranty Company of West Virginia, certify under oath that the above statement is true and correct.

W. G. PETERKIN,
President.
J. H. KNAPP.

Subscribed and sworn to before me this 3rd day of July, 1912.
[SEAL.] J. L. KNAPP,
Notary Public in and for Wood County, West Virginia.

My commission expires August 29, 1917.

200 The following is a copy of the supersedeas:

THE COMMONWEALTH OF KENTUCKY:

Warren Circuit Court.

L. & N. R. R. Co., Appellant,
against
WM. H. STEWART'S ADM'R'X, Appellee.

Supersedeas.

I do certify that an appeal has been granted from this Court for a judgment obtained by Wm. H. Stewart's Adm'r'x against L. & N. R. R. Co. for ($20,000.00) twenty thousand dollars and costs in the Warren Circuit Court, at its April Term, 1912, and that a supersedeas bond has been executed as required by section 749, Codes of Practice. Therefore the appellee and all others are commanded to stay proceedings on the whole of the judgment above recited.

Witness, my hand as Clerk of said Court, this 23rd day of Nov'r, 1912.

O. A. ROUP, *C. W. C. C.*

The following is a copy of the return indorsed thereon:

Executed on Mrs. Wm. H. Stewart's Adm'rx by delivering her a copy of the within supersedeas. Nov. 28, 1912.

W. L. McNEAL, *S. W. C.*
By T. J. HOLMAN, *D. S.*

201 STATE OF KENTUCKY,
County of Warren, sct.

I, O. A. Roup, Clerk of the Warren Circuit Court, do certify that the foregoing 104 pages, with the bill of evidence attached, contain a true, correct and complete transcript of the entire record, process excepted, of the case late- pending in the Warren circuit court, wherein Wm. H. Stewart's Administratrix, Jeanette Stewart, was plaintiff, and the Louisville & Nashville Railroad Company was defendant, as same appears to us of record.

Given under my hand, this 4th day of December, 1912.

O. A. ROUP, *Clerk,*
By —— ——, *D. C.*

202 Court of Appeals of Kentucky.

December 19, 1913.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

Opinion of the Court by Judge Turner, Reversing.

On September 5th, 1908, William H. Stewart, an engineer employed by appellant, while running a train from Paris, Tenn., to Bowling Green, Ky., was injured, and as a result thereof died twenty two days later from inflammation of the brain. Thereafter his wife qualified as administratrix, and instituted this action as personal representative seeking damages under the Employers' Liability Act of April, 1908. The jury returned a verdict for $20,000, and from a judgment on that verdict this appeal is prosecuted.

Upon the occasion in question the train was coming North from Paris, Tenn. towards Bowling Green, Ky.; when it reached
203 Cumberland City, Tenn. it met a Southbound freight train, and accordingly, the Northbound train went in on the single switch which was at that point, so that the freight train might proceed South; but there was also due at that point a Southbound passenger train in a short time, and Stewart's train had to wait there

until it also went South. Stewart's train had to clear the main track first to let the freight train proceed South, and later to permit the passenger train to pass. Stewart's freight train was a long train, and there were several cars standing on the side-track when his train went in on it. The cars so standing were coupled to the engine and pushed ahead of the engine on the side-track as it proceeded North; when the freight train had gone far enough North to clear the main track at the South end of the switch to enable the freight train standing on the main track to pass South, the cars so pushed ahead of the engine on the side-track were either on the main track at the North end of the switch or so close to the main track as to foul it, or not to be "in the clear" of the main track upon which the passenger train which was shortly expected from the North must pass; the flagman in charge of the rear-end of the train, after his train was on the switch, threw the switch and locked it, as it was his duty to do, so that not only the freight train but the expected passenger train might proceed South. After the freight train had gone South the conductor, who was up near the engine and cars near the North end of the switch, signaled the engineer to back his train,
204 evidently with the purpose of leaving the North end of the switch clear so that the passenger train might pass; a flagman had already been sent out to flag the approaching passenger train to the North.

There were three crossings going over the side-track, one very near the South end of the switch, and the other two were blocked by the standing freight train; it was the duty of the Company to keep these crossings open, and the rear flagman as soon as he had closed the switch started up to the middle crossing to see if anybody wanted to get through, and if necessary to open it; but before he reached the middle crossing the conductor up at the front of the train gave the engineer a signal to back his train, and this he proceeded to do; the rear flagman, whose duty it was not only to keep the crossings open, but to throw the switch at the South end so that the switch would not be split, and to avoid a possible derailment of cars, immediately started back while the train was moving for the purpose of throwing the switch; but when he reached the rear of the train, doubting whether he had time to unlock and throw the switch before the caboose reached it, he put on the emergency air-brake from the rear of the train called an angle-cock, and stopped the train before the caboose reached the switch, and just about where it fouled the main track. The putting on the emergency in this way from the rear had the effect to immediately stop
205 the whole train, and cause a considerable jerk or jar, and it is claimed by the plaintiff that this jerk or jar threw him up against the side of the cab of the engine and bruised his shoulder and injured his head in such a way as resulted in his death.

The crew of the train consisted of five men, Jones, the conductor; Stewart, the engineer; Minor, the brakeman at the front of the train, and Hill, the flagman at the rear of the train, and Sorrels, the fireman.

Jones, the conductor, did not testify upon the trial, but we have the testimony of Minor, Hill and Sorrels.

The testimony is that the siding was not long enough to hold Stewart's train and the cars which were already on it, and at the same time be clear of the main track at both ends, so that it was necessary to back his train till he cleared the main track at the North end of the switch so that the passenger, a much shorter train, could pull down the main track and stop clear of the North end of the switch till the freight train could pull up North so as to clear the main track at the South end; in other words as expressed by railroad men, they had to "saw-by". Sorrels, the fireman, testified that the conductor gave Stewart the signal, and the engineer gave three blasts of the whistle, and then started back slowly, and while so backing slowly and after the train had backed a short distance the flagman, Hill, put on the emergency application of the air-brake at the rear and stopped the train suddenly, and that the jar threw Stewart up against the window and Stewart claimed
206 immediately afterwards that it had hurt his head and shoulder; that the jar was neither hard nor soft, but medium.

Minor states that the emergency application caused a "right smart" jar, that it stopped every car including the engine at once, and that such an application might endanger some part of the train, or might result in injuries to persons around or on the train.

Hill, the rear flagman, who applied the air, testified that he applied it for the purpose of preventing the train "from splitting the switch", and possibly derailing one or more cars; that he did not apply the brakes for the purpose of "bunching the slack," although its application did have that effect, and did have the effect to keep the rear end of the train from going on the main track at the South end of the switch. He testified that after the train had pulled on to the side-track from the main track he threw the switch and locked it; that it was his duty then to go to the middle crossing which was blocked by the freight train to see if anyone wanted to get by, and to cut the train if necessary and let them by; and after he had locked the switch he started to the middle crossing which was from four to six hundred feet distant from the lower crossing near where the caboose stopped; that he had gone about one-third of the way when the train began to back, and he immediately hastened back towards the rear of the train, and thinking he did
207 not have time to unlock and throw the switch before the train got to the main track, he put on the emergency from the rear and stopped the caboose before it reached the main track and about at a point where it would foul the main track.

Two rules of the company were introduced in evidence as follows:

No. 1. "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reached the exact spot".

It was shown, however, that the latter sentence had no application where the air is applied from the rear of the train.

The other rule introduced was as follows:

No. 2. "A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock and see that it is securely fastened, and after having done so, must look twice at the switch rails to see that they are in their proper position.
208 At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten feet from the switch until the expected train has passed."

The petition charged in general terms that the death of Stewart was brought about by the negligence of the agents and employes of defendant, but does not specify in detail the negligence complained of; it is urged by appellant that the demurrer to the petition should have been sustained because the plaintiff was proceeding under a Federal Statute and should have been required to set up with particularity the acts of negligence complained of as he would have been required to do in the Federal Court; but the Act of Congress does not undertake to prescribe the mode of procedure where the action is pending in the State Courts except in certain particulars not here involved. So that the general allegation of negligence being held sufficient in this State prior to the enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that Act.

It is urgently insisted for appellant that it was entitled to a peremptory instruction. We have given above the substance of the evidence, and must say that so far as the evidence shows any negligence upon the part of Hill, the rear flagman, that appellant's contention should have been sustained. It was Hill's duty to lock the switch at the South end of the siding just as he did. Under one of the rules quoted it was his duty to remain near that
209 switch until the expected train had passed on the main track, but he was relieved from that duty by the further imperative duty which devolved upon him of seeing that the middle crossing was kept open for traffic; it was the duty of the company under the laws of Tennessee to keep those crossings open, and Hill immediately after closing the switch proceeded to the performance of this latter duty, and before he could get to the middle crossing the train began to back, and he knowing that the switch was closed immediately ran back towards the rear of the train, but finding he did not have time to unlock and throw the switch in order to prevent the "splitting of the switch" and possibly the derailment of some of the cars, and consequent delay in traffic which would have resulted therefrom, he did the only thing which he could reasonably have done, and that was to apply the emergency air-brake by angle

cock; and it is doubtful from the evidence whether he then applied it in time to prevent the freight train from fouling the main track.

But, the conductor was guilty of negligence; he gave the order to back the train when he knew or should have known that the switch at the South end of the siding was locked; he knew or should have known that the rear flagman, after locking that switch, had to see to the keeping open of the middle crossing, and, therefore, knew or should have known that the flagman was not at the
210 switch when he gave that order to back, and that if the rear end of the train backed on to the main track at the South end of the switch it would split the switch and possibly derail some cars and delay traffic. He knew that under the rule above quoted that the train before entering or leaving a siding must come to a full stop before the switch is thrown, and that until the switch is thrown and the lock secured no signal must be given for starting. The conductor knew that his train was too long for that siding to be "in the clear" of the main track at both ends; he necessarily knew that when he backed that train so as to clear the main track at the North end of the switch that it would probably run out on to the main track at the South end, and before giving that order he should have known either that the switch was open or that the flagman was there to open it. The front flagman had been sent ahead to flag the approaching passenger train, and there was no such emergency existing to clear the North end of the switch as justified him in giving the order to back until he knew that the switch at the South end was open or that the flagman was there for the purpose of opening it. For these reasons the motion for a peremptory instruction was properly over-ruled.

But the instructions of the Court were radically wrong in several particulars. The correct measure of damages in such cases has been so often pointed out by this Court that it would seem unneces-
211 sary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, and loss of companionship, and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. On another trial of the case the second instruction which deals alone with the negligence of Hill, the flagman, if the evidence is the same, will under our view of the case probably be eliminated, and for that reason we will not consider it. Instruction No. 3 is erroneous for the same reason as instruction No. 1; it should have been in substance that the measure of recovery is such sum as will compensate his estate for the destruction of his power to earn money, and that the jury may in arriving at this amount consider all the evidence in the case bearing upon this question. Instruction No. 4 should be given on a new trial in conformity with the rule laid down in Nashville, Chattanooga & St. Louis Railroad Company v. Banks, this day decided, 156 Ky. 609.

The Court will also upon the return of the case give such instruc-

tions to the jury as will apportion the ultimate recovery, if any, between the beneficiaries as is suggested by the Supreme Court in the case of Gulf, Colorado, &c., Ry. Co. vs. McGinnis, 228 U. S. 173.

212 For the reasons indicated the judgment is reversed, with direction to grant appellant a new trial and for further proceedings consistent herewith.

Benjamin D. Warfield, Louisville, Ky.; Sims & Rodes, Bowling Green, Ky., for appellant.

Wright & McElroy, Bowling Green, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky., for appellee.

[Endorsed:] Dec. 19, '13. L. & N. vs. Stewart's Adm'x.

213 Court of Appeals of Kentucky.

Feb. 27, 1914.

Louisville & Nashville Railroad Company, Appellant,
vs.
Wm. H. Stewart's Administratrix, Appellee.

Response to Petition for Modification and Rehearing.

Opinion of the Court by Judge Turner.

Appellant's petition for a modification of the opinion insists that the language used by the Court in discussing whether the conductor Jones was negligent may be interpreted by the lower court upon a new trial as definitely determining that the conductor was negligent, so that the parties might be precluded upon another trial from introducing evidence upon that subject. But such was not the purpose of the Court; it was merely intended to point out that there was sufficient evidence of negligence upon the part of the conductor to authorize the submission of the case to the jury.

214 Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this Court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal Statute.

Upon a new trial the measure of damages will be given under the Federal Statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. Ry. vs. Dwyer's Adm'x, 157 Ky. 590.

To the extent indicated the opinion is modified, and the petitions for modification and rehearing in all other respects are overruled.

BENJAMIN D. WARFIELD, Louisville, Ky.,
SIMS & RODES, Bowling Green, Ky.,
For Appellant.
WRIGHT & McELROY, Bowling Green,
HAZELRIGG & HAZELRIGG, Frankfort, Ky.,
B. F. PROCTER, Bowling Green,
For Appellee.

215 Be it remembered, that the following is a true, correct and complete copy of the record, so much thereof as ordered by the schedule herein copied, of the case late pending in the Warren Circuit Court in which W. H. Stewart's Adm'r'x, sueing for herself as widow, and James Theodore Stewart, Wm. Albert Stewart and Christine R. Stewart, infant children of said decedent was plaintiff, and the Louisville & Nashville Railroad Company was defendant.

Please before the Hon. McKenzie Moss, Judge.

The following is a copy of an order entered in open court on the 14 day of March, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X, Plaintiff,
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

On defendants motion this cause is now reinstated upon the docket of this court. Thereupon came the defendant, Louisville & Nashville Railroad Company, and filed in open court mandate of the Court of Appeals in this case, which is in the words and figures as follows, to-wit:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals. Dec. 19th., 1913, Feb'y 27th, 1914. 191.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
216 WM. H. STEWART'S ADM'X, Appellee.

Appeal from a Judgment of the Warren Circuit Court.

The Court Being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded with directions to grant appellant a new trial and for further proceedings consistent with the opinion and modified opinion herein. Which is ordered to be certified to said Court.

A copy. Attest:

ROBERT L. GREENE, *C. C. A.*,
By A. ADAMS, *D. C.*

Issued Feb'y 27, 1914.

And it is ordered that the judgment heretofore entered upon the verdict of the Jury be and the same is hereby set aside and held

for naught and that defendant be granted a new trial in accordance with the opinion of the Court of Appeals rendered in this cause and this cause is now continued.

The following is a copy of an order entered in open Court on the 26th day of May, 1914.

Warren Circuit Court.

W. H. STEWART'S ADM'X, Plaintiff,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came the defendant and tendered in open Court and asked to file an amended answer herein, to which the plaintiff objected and notwithstanding the objections, the Court permitted the same to be filed, to which the plaintiff objected and excepted, and thereupon came the plaintiff and filed reply to said amended answer.

217

Affirmative matter of reply, by consent, controverted of record.

The following is a copy of the amended answer filed in open court on the 26th day of May, 1914:

Warren Circuit Court.

STEWART'S ADM'R'X, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

Came defendant, for amendment to its answer herein, states that decedent, W. H. Stewart, prior to his death held an accident policy in the Locomotive Engineers Mut. Life & Accident Insurance Company wherein his estate should recover for the destruction of his life by accident the sum of $5,000.00; that upon and after his death the plaintiff collected upon the said policy the sum of $5,000.00, which was paid to and received by her for the use and benefit of herself and her three children as a pecuniary benefit or compensation for the destruction of her husband's life by the same alleged accident as is set out in their petition herein; that said sum of $5,000.00 was apportioned, one half to herself and one sixth to each of said children, and this defendant avers should any judgment be rendered against it in the case, the same should be credited by the aforesaid sum of $5,000.00 in the proportions as between widow and children as above set out.

218

Wherefore, this defendant prays the judgment of this court ac-

cordingly, and as in its answer herein and for all proper and general relief.

SIMS & RODES.

The following is a copy of the reply filed in open court on the 26th day of May, 1914:

Warren Circuit Court.

STEWART'S ADM'R'X, Plaintiff,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply.

The plaintiff for reply to the amended answer this day filed admit that plaintiffs decedent carried upon his life $5,000.00 insurance, but they deny that it was payable to his estate, and deny that it was received by the plaintiff as administratrix, and deny that it was received for the benefit of herself and three children as a pecuniary benefit and compensation or otherwise for the destruction of her husband's life. They deny that the $5,000.00 was apportioned at all, or that she received one half to herself and one sixth to each of the said children, and they deny that in the event of recovery of judgment the said $5,000.00 should be proportioned between her and her said children as widow and children, or should be apportioned at all.

219 Further answering, plaintiff says that said policies were payable to herself and she assisted in paying the premiums on the policies, and after the death of her husband paid $— out of same on the indebtedness left by him.

Further answering, she says that her said decedent left to her no property other than said insurance, which was received by her in her individual capacity as the beneficiaries named in said policy.

Wherefore, she prays &c.

B. F. PROCTOR,
Att'y for Pl'ff.

The following is a copy of an order entered in open Court on the 26th day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

Came defendant and filed exceptions to the depositions filed by plaintiff.

Came parties, by attorneys, and the issue being joined, thereupon came the following jury: C. C. Eadens, W. J. Wade, Holly Mitchell, James Grubbs, W. P. Waters, A. F. Lowe, W. E. Drake, Gene Finney, Charles Carter, Henry Shanks, Joe Mercer and Robert Motley, who were sworn to well and truly try the issue and a true verdict render, and after hearing statements of counsel, there not being time to complete the trial on today, the jury were permitted to — until tomorrow morning under the usual admonitions and instructions of the Court, not to speak *of* themselves or permit any one to speak to them concerning this case.

Ordered that the official stenographer, Belle Galloway, report the testimony had and heard on the trial of this case.

The following is a copy of an order entered in open Court on the 27th day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X, Plaintiff,
v.
L. & N. R. R. Co., Defendant.

Order.

Again came parties by attorneys, and the jury sworn in on a former day and after hearing part of the testimony, there not being time to complete the trial on today, the jury were permitted to go until tomorrow morning under the usual instructions and admonitions of the Court not to speak *of* themselves or permit any one to speak to them concerning this case.

The following is a copy of an order entered in open court on the 28 day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Verdict and Judgment.

Again came parties, by attorneys, and the jury sworn in on a former day and after hearing the remainder of the testimony, instructions of the Court and argument of counsel, retired to their room to consider of their verdict and afterwards returned into open court the following verdict:

"We the Jury find for

	Mrs. Stewart	$2,472.00
221	The oldest child	2,472.00
	Second child	2,472.00
	Youngest child	4,469.00
	Total	$11,885.00

W. J. WADE, *Foreman.*"

It is therefore adjudged by the Court that the plaintiff recover of the defendant eleven thousand eight hundred and eighty five dollars ($11,885.00), apportioned as provided in the verdict, $2472.00 for the benefit of herself as widow; $2472.00 for the benefit of her infant son, Jas. Theodore Stewart; $2472.00 for the benefit of her infant son Wm. Albert Stewart; and $4469.00 for the benefit of her infant daughter, Christine R. Stewart, and her costs herein expended, to all of which judgment defendant excepts.

The officers of the Court are given a lien on the above judgment for their fees herein.

The following is a copy of an order entered in open court on the 30 day of May, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came the plaintiff and moved for a new trial, and filed written grounds in support of the motion.

222 The following is a copy of the motion for New Trial filed in open court on the 30 day of May, 1914:

Warren Circuit Court, May Term, 1914.

W. H. STEWART'S ADMINISTRATRIX
v.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion for New Trial (Plaintiff's).

The plaintiff comes and moves the Court to set aside the verdict of the Jury and the judgment of the Court thereon and grant her a new trial in this cause, and for cause says:

1. The Court erred to the prejudice of the substantial rights of the plaintiff in giving to the jury instructions 1, 2, 3, 4, 5 and 6, all or

any of them, to all of which plaintiff objected and excepted at the time.

2. That the Court erred on the trial in excluding from the jury important evidence and erred in like manner in admitting incompetent evidence to the jury, especially in permitting defendant to prove that plaintiff collected life insurance to the amount of $5,000 after her husband's death on policies made payable to her.

The evidence excluded and that admitted and the ruling of the Court thereon will be fully shown in the official transcript of the evidence made by the official stenographer, which will be filed as part of this motion. Plaintiff says by reason of the ruling aforesaid the substantial rights of the plaintiff as administratrix and the other beneficiaries of the estate were prejudiced and materially affected, and she was prevented from having a fair trial.

223 3. That the damages awarded plaintiff are too small to compensate her and the other beneficiaries for the injuries.

B. F. PROCTOR,
WRIGHT & McELROY,
Att'ys for Pl'ff.

The following is a copy of an order entered in open court on the 30 day of May, 1914:

Warren Circuit Court.

W. H. STE-ART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

This day came defendant, Louisville & Nashville Railroad Company, and filed its motion and grounds for a new trail herein.

The following is a copy of the motion entered in open Court on the 30 day of May, 1914.

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Motion and Grounds for New Trial (Defendant's).

Comes the defendant, Louisville & Nashville Railroad Company, and moves the Court to set aside the verdict of the jury herein, and to grant to the defendant a new trial upon the following grounds, to-wit:

(1) Because the damages given by the jury in their verdict are

excessive and appear to have been given under the influence
224 of passion and prejudice.

(2) Because the verdict is not sustained by sufficient evidence and is contrary to law.

(3) Because the Court erred in refusing, on motion of defendant at the conclusion of plaintiff's testimony to peremptorily instruct the jury to find a verdict for the defendant; and because the Court again erred at the conclusion of all the testimony to instruct the jury to find a verdict for the defendant.

(4) Because the Court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, 6 and 7, and each of them.

(5) Because the Court erred in refusing to give to the jury, on motion of defendant, instructions marked A, B, C and D and each of them.

(6) Because the Court erred, in admitting, over the objection of the defendant, incompetent evidence to go to the jury, and because the Court erred in the exclusion of competent evidence offered by defendant, all to the prejudice of defendant.

(7) Because the Court erred in overruling the defendant's motion, made at the conclusion of plaintiff's examination in chief by her counsel before the jury, to discharge the jury, and because the Court also erred at the conclusion of all the testimony in refusing to discharge the jury and continue the case upon motion of the defendant.

(8) Because the Court erred to the prejudice of the defendant in permitting the plaintiff to sit in the Court room during the trial with her afflicted child upon her lap and to carry said child to the witness stand with her and keep the same in her lap during all the course of her testimony in the presence of the jury, and to the prejudice of the defendant and over its objection.

225 (9) Because the Court erred in giving to the jury instructions Nos. 1, 2, 3, 4, 5, and 6 and seven (7), all and each of which are not in conformity to, but in violation of the terms and provisions of the act of Congress of April 22, 1908, commonly known as the Employers' Liability Act, and in refusing, on motion of defendant, to give to the jury instructions mark- A, B, C and D, all and each of which are in conformity to the said act of Congress, commonly known as the Employers' Liability Act; and further erred in permitting testimony to be heard by the jury over defendant's objection, as to the condition, situation and ages of intestate's children, and the affliction and idiocy of the plaintiff's third child, for the purpose of magnifying the damages sued for, in violation of the terms and provisions of said act of Congress of April 22, 1908; and further erred in overruling defendant's motion to require the plaintiff to make her petition more specific and definite and to set out what act or acts of negligence were complained of, and the bases of the damages sued for as required by the uses and practices and rules prevailing in the Federal Court of the United States, in conformity to the terms and provisions of said act of Congress of April 27th, 1908; and because the Court erred in overruling, at the conclusion of plaintiff's testimony and again at the conclusion

of all the testimony, to peremptorily instruct the jury to find a verdict for the defendant, because, under such evidence, no right of action existed against defendant according to the terms and provisions of said act of Congress of April 22, 1908.

226 Defendant states further that by reason of such errors above complained of, the defendant has been deprived of the benefit of those provisions of the Constitution of the United States set out in Articles V and XIV of the amendments to said constitution, and it has thereby been deprived of property without due process of law, in violation of Article V of said Amendment, and it has further been deprived of property without due process of law, and denied the equal protection of the laws, in violation of Article XIV, section 1, of said amendment- to the Constitution of the United States.

(10) Because the alleged verdict returned by the jury is not a proper or valid verdict, because same is indefinite and uncertain in meaning, and not in any form required by law or the instructions of the Court.

(11) Because the judgment of this Court rendered upon said verdict is not in conformity to said verdict, and is contrary to law, and of said Act of Congress above set out.

Wherefore defendant prays for a new trial herein, and for all proper relief.

SIMS & RODES,
Att'ys P. D.

The following is a copy of an order entered in open court on the 13 day of June, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

227 This cause having been submitted upon plaintiff's motion and grounds for a new trial and at the same time upon the defendant's motion and grounds for new trial, *and* the Court being advised, adjudges and orders that the plaintiff's motion — and the same is now overruled, to which ruling of the Court the plaintiff excepts and prays an appeal to the Court of Appeals of Kentucky, which is granted, and she is now given, by consent of parties, until the 10th day of the next October term of this Court in which to tender and offer to file her bill of exceptions herein, and the transcript of the testimony.

It is further adjudged and ordered that defendant's motion for a new trial be and the same is now overruled, to which ruling of the Court defendant excepts and prays an Appeal to the Court of Appeals of Kentucky, which is granted, and the defendant is given by

consent of parties until the 10th day of the next October term of this Court in which to tender and offer to file its bill of exceptions herein, together with a transcript of the testimony, and the official stenographer of the Court is hereby directed to make out a true copy of all the testimony taken by her in shorthand, as required by law, and to lodge same with the papers of the case on or before the 10th day of the next civil term of this court.

The following is a copy of an order entered in open court on the 20 day of October, 1914:

Warren Circuit Court.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Order.

228 On this the second day of the October term of the Warren circuit court, came the defendant in the above styled case, the Louisville & Nashville Railroad Company, and tendered and offered to file its Bill of Exceptions herein, together with the official stenographer's transcript of the testimony, which was ordered to be marked "tendered" by the Clerk as of this day, and there not being time to consider the same, it was taken under advisement by the court for examination and approval.

The following is a copy of an order entered in open Court on the 28 day of October, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

Came plaintiff and in open Court, tendered her bill of exceptions and offered to file same, and the Court took same for examination, approval and filing.

The following is a copy of an order entered in open Court on the 2nd day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X
v.
L. & N. R. R. Co.

Order.

The defendant having tendered heretofore its bill of exceptions, and the transcript of testimony in duplicate, marked X, and the same having been taken under advice by the Court, and after
229 having been examined, is now signed and approved, and is ordered to be, and is made a part of the record, without being spread on the order book.

WM. H. STEWART'S ADM'R'X
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered, that on the trial of this case at the May term, 1914, of the Warren circuit court, before the Hon. McKenzie Moss, Judge, and the Jury, the evidence was taken by Mrs. Belle Galloway, official stenographer of this court, and her transcript of the evidence, together with the objections and exceptions therein, both as to the competency of witnesses and testimony, certified to by her and approved by the Judge of the Court, is made a part of this bill of exceptions the same as if copied herein in full. Said official stenographer's transcript of the evidence contained all the evidence introduced and heard and offered to be introduced and rejected, as well as all papers and exhibits offered and used or rejected as evidence on the trial of the above-styled cause, as well as all objections made, rulings had, exceptions taken and avowals made, and said transcript of the evidence is filed herewith as part hereof in duplicate, and for identification is marked X. Be it further remembered, that at the conclusion of plaintiff's testimony and again at the conclusion of all the testimony, the defendant moved the Court to
230 instruct the jury peremptorily to find a verdict for the defendant, which motions and each of them the Court overruled, and to which ruling of the Court defendant excepted at the time and still excepts. Be it further remembered, that at the conclusion of all the testimony in the case, the Court on its own motion, gave to the Jury instructions Nos. 1, 2, 3, 4, 5, 6 and 7, which are as follows, to-wit:

#1. "If the Jury believe from the evidence that on the occasion in controversy, the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate was serving as engineer,

so as to cause him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they will find for the plaintiff."

#2. "If the jury find for the plaintiff, the measure of damages is such a sum as they may believe from the evidence will fairly and reasonably compensate the widow and the three children of plaintiff's intestate, for such pecuniary benefits as they may believe from the evidence they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant, if it was so caused; and if they find for plaintiff, they will apportion their finding amongst the widow and three children, and state in their verdict how much, if anything, they find for each of them, the whole of the recovery not to exceed the amount sued for, to-wit: $35,000.00. And in estimating the damages, if they find for the plaintiff, the jury will consider the proof as to decedent's habits of industry and sobriety, only as affecting his power to earn money."

231 #3. "The Court instructs the jury that under the rules of defendant company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle cock on the rear of the train, only when necessary to avoid injury to life or property; and, if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake, to avoid injury to life or property; and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application — said emergency air brake, then they should find for plaintiff."

#4. "The Court instructs the jury that in the operation of defendant's trains it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

#5. "The Court instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve

232 in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; unless, however, they shall further believe from the evi-

dence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff."

#6. "The Court further instructs the jury that by negligence as used in the instruction is meant the failure to use such care as a person of ordinary prudence would exercise under the same or similar circumstances."

#7. "Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict."

To the giving of these instructions and each of them the defendant objected, but the Court overruled defendant's objection and gave said instructions to the jury, to which ruling of the Court defendant excepted at the time and still excepts.

Be it further remembered, that at the conclusion of the testimony the defendant moved the Court to give to the Jury instructions marked "A," "B," "C," and "D," which are as follows, to-wit:

233 "A." "The Court instructs the jury that the flagman Hill in stopping the train at the time and place shown in the evidence was not negligent, and the plaintiff can recover nothing in this case by reason of the act or acts of said flagman."

"B." "Unless the jury believe from the preponderance of the evidence as predicated in instructions of the Court, they shall find a verdict for the defendant."

"C." "The Court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

"D." "The Court instructs the jury that if they should find a verdict in favor of the plaintiff and apportion anything for the benefit of Mrs. Jeanette Stewart, the widow of W. H. Stewart, deceased, then they shall credit whatever sum they may so find, if any, by the sum of $5,000, amount of insurance collected by her upon his life."

The plaintiff objected to the giving of these instructions and each of them and her objection was sustained, and said instructions and each of them refused by the Court. To the rulings of the Court in refusing to give said instructions and each of them this defendant excepted at the time and still excepts.

Be it further remembered, that at the conclusion of the testimony the plaintiff moved the Court to give to the Jury instructions marked "P 1," "P 2," "P 3" and "P 4," which are as follows, to-wit:

234 "P 1." "The Court instructs the jury that if they believe from the evidence that on the occasion in controversy the defendant's agents and employees in charge of its train, or any of them, did with negligence operate and manage the train upon which plaintiff's intestate, W. H. Stewart was serving as engineer, so as to cause him to fall against the cab or engine and that he died as a natural and proximate result of said negligence, they shall find for plaintiff such a sum as will fairly compensate the surviving widow and his three infant children for his death, if it occurred wholly or in part from the negligence of any of the

servants or agents of defendant as aforesaid, not to exceed the sum of thirty five thousand dollars."

"P 2." "The Court further instructs the jury that if they believe from the evidence that plaintiff should recover for the negligence of defendant's agents and servants as set out in instructions No. 1, if any, and further believe from the evidence that said Stewart was himself negligent, and but for his own contributory negligence he would not have been hurt, then the jury may reduce the amount of plaintiff's recovery in proportion to the amount of negligence attributable to said Stewart."

"P 3." "The Court further instructs the jury that if they believe from the evidence that an emergency existed but the use of the emergency application was not necessary nor believed to be necessary by the flagman in the exercise of a reasonable judgment in the prudent and careful operation of the train for the purpose of preventing an injury to the property of defendant as set out in instruction No. 1."

235 "P 4." "The Court further instructs the jury that plaintiff's intestate in entering the service of defendant assumed only such risks as are usual and necessary in the prudent and careful operation of the train and unless they believe from the evidence that defendant'- agents and servants were managing said train prudently and carefully at the time the emergency was applied, or if they believe from the evidence that there would have been no necessity for the use of the emergency but for the preceding negligence, if any, of the defendant's agents or any of them, they should find for plaintiff as set out in instruction No. 1."

To the giving of these instructions and each of them, the defendant objected and the Court sustained its objection and declined to give said instructions or any of them. To the ruling of the Court in refusing to give said instructions or any of them plaintiff excepted at the time and still excepts.

The above instructions as set out herein are all the instructions that were offered, given or refused in the trial of this case.

Be it further remembered that the plaintiff testified for herself upon the trial of the case and when she took the witness stand carried her youngest child with her, and said child sat upon the witness' lap in the immediate presence of the jury during her entire testimony. Said child was afflicted in mind, which was exhibited in the face of said child, which made grimaces in the presence of the jury as it sat upon its mother's lap. To the carrying of said child to the witness stand and keeping it upon the lap of the mother the defendant objected, but the Court overruled its objection, to which ruling of the Court the defendant excepted at the time and still excepts; whereupon, because of the introduction and

236 exposure of said child, at the conclusion of the examination of plaintiff in chief by her counsel before the jury the defendant moved the Court to discharge the jury, and again moved the Court at the conclusion of all the testimony in the case to discharge the jury and continue the case, but the Court overruled

each of said motions, to which ruling of the Court the defendant excepted at the time and still excepts.

The jury having returned a verdict for the plaintiff and judgment having been rendered thereon, defendant filed written grounds and moved the Court to vacate and set aside said judgment and grant it a new trial, which motion and grounds were ov-rruled, to which ruling defendant excepted at the time and still excepts, and prayed an appeal to the Court of Appeals, which was granted. Now comes this defendant and tenders this bill of exceptions and also the transcript in duplicate of the official stenographer's transcript of the evidence and on its motion said bill of exceptions is examined, signed, attested and approved by the Court, and said transcript of the evidence is examined, signed, attested and approved by the Judge; and it is now ordered that they be filed and made a part of the record without being spread on the order book, and it is now certified that this bill of exceptions, with said transcript of the evidence, contains all the evidence in this case, and is true and correct in every particular.

Attested and approved:

McKENZIE MOSS,
Judge of the Warren Circuit Court.

237 The following is a copy of an order entered in open court on the 3 day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'-
v.
L. & N. R. R. Co.

Order.

The bill of exceptions heretofore tendered herein by the plaintiff and taken under advisement by the Court having been examined by the Court, is now approved, signed and ordered to be and is made a part of the record, without being spread upon the order book.

The following is a copy of the bill of exceptions tendered in open Court on the 28 day of October, 1914, and filed on the 3 day of November, 1914:

Warren Circuit Court.

W. H. STEWART'S ADM'R'X.
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Bill of Exceptions for Plaintiff.

Be it remembered, that on the trial of this *term* at the May term, 1914, the Court gave to the jury instructions 1, 2, 3, 4, 5and 6, all

of which are fully set forth in the bill of exceptions tendered by defendant October 17, 1914, and the Court refused to give to the jury instructions P. 1, P. 2, P. 3, and P. 4. Plaintiff objected and excepted to the instructions given by the Court, and excepted to the ruling of the Court in refusing to give the four instructions offered in her behalf as aforesaid.

238 Be it further remembered, that on the trial of said cause plaintiff asked to read in evidence the deposition of O. L. Hill filed in this cause, and which is copied into the transcript filed in this cause on a former appeal. The Court refused to permit the plaintiff to read the deposition of O. L. Hill upon the ground that O. L. Hill was then present as a witness for defendant, to which plaintiff objected and excepted, and the deposition as copied in the transcript filed on appeal is referred to as part of this bill of exceptions.

Be it further remembered, that plaintiff asked to read in evidence on said trial from the revised rules for governing transportation in force at the time by the defendant railroad, rules 44, 69 and 119. The court refused to permit any of the said rules to be read to the jury, to which ruling plaintiff objected and excepted, and said rules are as follows:

"44. Three short blasts of the whistle, when the train is standing (to be repeated until answered as provided in rule 61) is a signal that the train will back (thus — — —).

"69. The engine-bell must ring before starting a train, and when running through tunnels and the streets of towns or cities."

"119. No train shall leave a station without a signal from its conductor."

Be it remembered, that on the trial of said cause the Court permitted defendant to prove that plaintiff collected life insurance payable to herself after her husband's death to the amount of $5,000, to which plaintiff objected and excepted.

239 Be it further remembered, that plaintiff moved that a new trial be granted her, because the verdict of the jury did not allow her enough damages, and the damages were too small to compensate her and the estate for the death of her said husband. The Court overruled the motion, to which plaintiff objected and excepted.

Plaintiff asks that this her bill of exceptions be examined and approved by the Court and filed as part of the record herein.

All instructions asked, refused or given by the Court are set forth in the bill of exceptions tendered by defendant in this cause.

Examined and approved.

McKENZIE MOSS,
Judge Warren Circuit Court.

The following is a copy of the supersedeas bond executed in office on the 19 day of June, 1914:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
W. H. STEWART'S ADM'R'X, Appellee.

Supersedeas Bond.

Upon an Appeal from a Judgment of the Warren Circuit Court,
Rendered 28 Day of May, 1914.

Whereas, said appellant, Louisville & Nashville Railroad Company, — an appeal from the judgment of the Warren circuit court, rendered at its May term, 1914, against it in favor of the appellee, for the sum of eleven thousand eight hundred and eighty five — ($11,885.00) and the appellant desires to supersede the judgment above mentioned;

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Now, we, Citizens Trust & Guaranty Company of West Virginia, surety, do hereby covenant to and with the appellee, Jeanette Stewart, administratrix of W. H. Stewart, deceased, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the judgment above stated, in the event that it should be affirmed, and any judgment or order which the Court of Appeals may render or order to be rendered by the inferior Court, not exceeding in amount or value the judgment aforesaid.

Witness our hands, this 19 day of June, 1914.

CITIZENS GUARANTY & TRUST CO.
OF WEST VIRGINIA,
By JAMES C. SIMS, *Att'y in Fact.*

The following is a copy of the power of attorney filed in office June 19, 1914, and attached to said bond:

Citizens Trust & Guaranty Company, of West Virginia, a corporation organized under the laws of the State of West Virginia, with its principal office at Parkersburg, West Virginia, and duly licensed and authorized to become surety on bonds within the Commonwealth of Kentucky, hereby makes, constitutes and appoints James C. Sims or John B. Rodes, of Bowling Green, Kentucky, its true and lawful attorney for it and in its name to sign, seal and deliver

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a certain supersedeas bond for the Louisville & Nashville Railroad Company, to be given in the Warren Circuit Court in the case of Wm. H. Stewart's Adm'r'x vs. Louisville & Nashville Railroad Company, hereby ratifying and confirming all and singular the actions of the said attorney in fact in and about the execution and delivery of said bond, to all intents and purposes the same as if said bond had been executed by the proper officers of the said Guaranty Company at its home office. This power of attorney to be attached to or filed with said bond when so executed.

In testimony whereof, the said Guaranty Company has caused its corporate name to be signed hereto, and its corporate seal to be

affixed hereto and attested, by its proper officers thereunto duly authorized, this 13th day of Nov., 1914.

[SEAL.] CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA,
By W. G. PETERKIN, *President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To-wit:

I, J. L. Knapp, a Notary Public in and for said County, do certify that W. G. Peterkin personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is president of Citizens Trust & Guaranty Company, of West Virginia, the corporation described in the writing above, bearing date the 13th day of May, 1914, authorized by said corporation to execute and acknowledge deeds and other writings of said corporation, and that said writing was signed and sealed by him in behalf of said corporation, by its authority duly given. And the
241 said W. G. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal, this 13th day of May, 1914.

[SEAL.] J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

The following is a copy of the supersedeas issued on said bond:

THE COMMONWEALTH OF KENTUCKY:

Warren Circuit Court.

L. & N. R. R. Co., Appellant,
against
W. H. STEWART'S ADM'R'X, Appellee.

Supersedeas.

I do certify that an appeal has been granted from this Court *for* a judgment obtained by Jeanette Stewart, administratrix of W. H. Stewart, deceased, against Louisville & Nashville Railroad Company for $11,885.00, in the Warren Circuit Court, at its May term, 1914, and that a supersedeas bond has been executed as required by section 749, Codes of Practice.

Therefore the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness, my hand as Clerk of said Court, this 19th day of June, 1914.

O. A. ROUP, *C. W. C. C.*,
By S. C. LAWSON, *D. C.*

The following return is indorsed thereon: Executed on W. H. Stuard's Adm'r'x by delivering a copy of the within supersedeas to her. June 19, 1914. John C. Ray, S. W. C. By C. D. Venable, D. S.

242 & 243 TRANSCRIPT OF TESTIMONY.

Mrs. W. H. STEWART, Adm'x, &c., Plaintiff,
vs.
L. & N. R. R. Co., Defendant.

Filed Dec. 8, 1914. Robt. L. Greene, C. C. A.

244 TRANSCRIPT OF TESTIMONY.

Warren Circuit Court, May Term, 1914.

W. H. STEWART'S ADM'X, Paintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant

Be it remembered that upon the trial of the above styled cause in the Warren Circuit Court, the following oral testimony was introduced.

Testimony of Mrs. W. H. Stewart.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Are you the widow of W. H. Stewart?
A. Yes sir.
Q. What is your name, given name?
A. Mrs. Janette Stewart.
Q. Where were you raised?
A. In Bowling Green.
Q. Where was W. H. Stewart raised?
245 A. In Bowling Green.
Q. When did he die?
A. On September 27th, 1908.
Q. Where did he live at the time?
A. In Bowling Green.
Q. Were you thereafter appointed Administratrix of his estate?
A. Yes sir.

(Proof as to administration is waived.)

Q. How old was W. H. Stewart at the time of his death?
A. Thirty-four.
Q. What was his occupation at the time?
A. Engineer.
Q. How long had he been engineer?
A. I don't know, but I expect about three years.

Q. What year were you married?
A. In 1902.
Q. What time in 1902?
A. In May 1902. May 28th 1902.
Q. What other positions did he ever hold with the L. & N. Railroad Company?
A. He filled a good many. He was fireman, caller, and hostler.
Q. How long had he been working for the Railroad Company?
A. Ever since he was about seventeen or eighteen.
246 Q. He first worked as call boy?
A. Yes sir.
Q. How long had you been acquainted with him prior to his marriage?
A. Ever since I was about ten years old.
Q. Knew him ever since he was a call boy?
A. Yes sir.
Q. When was your first child born?
A. March 10th 1903.
Q. What is his name?
A. James Theodore.
Q. The second?
A. Born March 31st 1905.
Q. What is its name?
A. William Albert Stewart.
Q. When was your third child born?
A. December 9th 1907.
Q. What is its name?
A. Christine Stewart.
Q. Where is your oldest child?
A. In the Court room.
Q. What is his name?
A. James Theodore.
Q. Where is your second child?
A. He is at church now. Had to go for instructions this
247 morning.
Q. Where is your other child, the girl?
A. I have her here in my lap.
Q. Tell the jury what was the cause of the death of W. H. Stewart?

(Objection by Att'ys for Def't. Objection sustained.)
The Court: "She can state what was the matter with him, and how he appeared; she can state what appeared to be his condition."

Q. You say your husband died September 27th, 1908?
A. Yes sir.
Q. What was his condition immediately prior to his death, and if he was suffering from any disease or injury tell the jury what it was?

(Objection by Att'ys for Def't. Objection sustained.)
The Court: "Let her describe his condition and appearance to the jury."

A. From the time that he came in complaining?

The Court: "She can tell how he appeared and his condition but she can not tell what he said."

Q. What he complained of?

The Court: "I think not. Not what he said to her."

248 Mr. Procter: "Not what he said, she can not as I understand repeat any conversation, but the fact that he complained."

The Court: "That would be a conversation."

Q. Where was your husband Sept. 5th, 1908?
A. He came in off the road.
Q. What time did he get home?
A. Sometime in the afternoon, I don't know exactly the hour.
Q. What was his condition when he came home?
A. He was complaining.

(Objection by Att'ys for Def't overruled, to which Att'ys for Def't except.)

Q. How was he complaining, the Court instructs you not to tell his words, but if he was complaining of anything tell what it was?

(Objection sustained.)

Q. What was he complaining of, not what he said?

(Objection by Att'ys for Def't. Objection overruled, to which Att'ys for Def't except.)

The Court: "Of what hurt him, she might state that."

A. His head and shoulder were hurting him.

249 (Objection to the above answer by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

Q. That was on September 5th. Now on September 6th what was his condition?
A. He was still complaining and went up to see the doctor.
Q. What doctor?
A. Dr. Stone.
Q. From September 6th where was he, did he go out any more?
A. I think he went out on the 8th.
Q. What was his condition when he went out on the 8th?
A. Still complaining.
Q. Complaining of what?
A. His head and shoulder.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Did he prior to Sept. 5th ever complain of anything hurting him, his head and shoulder?
A. No sir.
Q. Now September 8th he went out on his run?
A. Yes sir.

Q. Did he report for service, or was he called for the run?
A. He was called for it, they were short of men.
Q. Then when did he return?
250 A. I don't remember, I think he made some turn arounds before he came back.
Q. Where was the turning around point?
A. Guthrie.
Q. What was his condition from September 5th until his paralysis?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He was always complaining from the time he came in on September 5th until he came in and was paralyzed.
Q. What was his appearance?
A. He seemed to be suffering.
Q. Where was it, was he paralyzed at any time?
A. Yes sir.
Q. When did that paralysis begin to appear on him?
A. On Tuesday before he died on Sunday. Tuesday morning when he got up when he was eating his breakfast.
Q. What day did he come in from his run prior to Tuesday?
A. I don't know but I think it was about the 20th, it was on Friday before he was paralyzed on Tuesday.
Q. Where was he when he was paralyzed on Tuesday?
A. At home.
Q. What was his condition?
A. Complaining.
Q. Complaining of what?

251 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. His head and shoulder.
Q. On Tuesday, was that the 23d, do you remember the day of the month?
A. Yes sir I think it was the 23d.
Q. Anyhow it was on Tuesday before the Sunday following?
A. Yes sir and that was the 27th.
Q. How was he affected?
A. It came on gradually, affected his tongue first.
Q. Was any doctor with him on the 23d?
A. I think he saw the doctor but I am not positive.
Q. Who was your family doctor at that time?
A. Dr. Stone.
Q. Now what was his condition on the 24th?
A. He was still complaining of his head and shoulder.
Q. Did that paralysis get worse or better?
A. Got worse.
Q. Did he get speechless, or was he able to speak up to the time of his death?

A. He got speechless on Tuesday evening before he died Sunday.
Q. Was he able to speak at all from Tuesday until Sunday?
A. No sir.
Q. When was he confined to his bed from that illness for
252 the first time?
A. On Tuesday.
Q. From Tuesday then until he died he was confined to his bed?
A. Yes sir.
Q. What was the condition of his health prior to September 1908?
A. It was good.
Q. You had been married to him six years then?
A. Yes sir.
Q. What sickness had he had from the time of your marriage until he came in on September 5th 1908 and was complaining?
A. He had one sick spell.
Q. When was that?
A. In the spring before he died in September.
Q. What sort of a man was he as to his habits?
A. His habits were good.

The Court: "Whether industrious or not, she can state."

Q. Did he have any bad habits?

The Court: "What were his habits?"
Mr. Procter: "His habits were good."
(Obj. by Att'ys for Def't to the Att'y for Pl'ff stating the answer to the question. Objection sustained.)

253 Q. Was he a member of any church?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: "We expect the witness to state that he was a member of the First Baptist Church."
Q. What were his habits for morality?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. They were good.
Q. What were his habits for industry?
A. Good.
Q. What were his habits for economy?
A. They were good.
Q. What was his manner and what was the character of his attention towards yourself and your children?

(Objection sustained.)

Q. What was the character of his attention towards you and your children?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: "We expect the wit-

ness to state that his manner and attention to herself and her children was good, and affectionate to her and his children."

Q. When he was off of his run and at home, what degree of
254 assistance, if any, did he give you in looking after your children?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He helped me as much as he could when off of his run, and was affectionate to me and the children.

Q. What salary was he earning at the time?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. From $135 to $160 a month.

Q. Was that the average?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. Yes sir.

Q. Do you mean $135 or $160 a month, or how?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Per month.

Q. What did he do with his salary?

255 A. He brought it to me and gave it to me.

Q. For what purpose?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. For the support of his family.

Q. Did you or his family have any other means of support except his wages?

A. No sir.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. Did he have any property at the time of his death?

A. No sir.

Q. Did you have any children old enough to go to school?

A. No sir.

Q. Have you any of the children in school now?

A. Two.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. What is the mental and physical condition of those children?

256 (Objection by Att'ys for Def't.)

The Court: "As governing the amount of recovery, if any-

thing, the Court does not regard the question as important, but as the jury is required to find for each beneficiary, and to proportion the finding, if they find anything, the jury is entitled to know the condition of the children."

(To the above ruling of the Court, the Att'ys for Def't except.)

A. The two boys are healthy, and their mental condition is good, but the little girl is not.

Q. What is the condition of the mind of that youngest child, the little girl?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. I can't tell you exactly what you would call it, she is not like she ought to be, she can't talk yet and she is past six years old.

Q. How old was she before she could walk?

A. She was past four.

Q. Can she walk well now?

A. Yes, she can walk well now.

257 Q. She can talk?

A. No sir.

Q. Has she any intelligence, can she learn anything?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She can learn a little but forgets it in a little time, nothing holds to her at all.

Q. What degree of care does she require of you?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She requires all of my attention, I have to watch after her all the time.

Q. Why do you have to watch after her?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Her mind is not strong enough to control herself, I have to watch her all the time. I have to keep her locked in the yard or the house, she has got to be in my sight all the time.

258 (Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. Your husband made a number of trips on the railroad as engineer from the 5th of September until the 20th of September?

A. Yes sir.

Q. Made his usual trips and run did he not?

A. Yes sir.

Q. He was not taken to his bed until the 23d day of September 1908, on Tuesday?

A. No sir. It was on Tuesday.

Q. And he died on the following Sunday, the 27th of September 1908?

A. Yes sir.
Q. He was out on the road a good part of the time after you were married?
A. Well, I think they all are.
Q. Well I say he was, was he not?
A. Yes sir.
Q. More than half of his time wasn't he?
A. I expect so.
Q. Isn't that your judgment that he was out on the road more than half of his time?
A. Well it was according to the business.
Q. But that was his usual habit, being away from home more than half of his time on the road?
259 A. He went when he was called, yes sir.
Q. His compensation depended entirely upon the runs he made?
A. Yes sir.
Q. You know where his runs were, his runs were from where to where?
A. He run from Bowling Green to Paris and from Paris to Guthrie and back to Paris and then through to Bowling Green.
Q. Now the run from Bowling Green to Paris usually kept him away from home how long each trip?
A. Well I don't remember, he was generally away two days anyhow.
Q. In making the run from Bowling Green to Paris, and from Paris back to Guthrie and the turn around from Guthrie back to Paris, how long would he be out on the turn around trips?
A. If he just made one, maybe he would get in the third day, but sometimes he would make two before he would ever come back to Bowling Green.
Q. How long would that keep him away from home?
A. I have known him to leave the first of the week and not get home until Thursday night or Friday morning.
Q. When away from home did he have a boarding place in Paris?
A. He did.
Q. Do you know where?
A. Well I expect on his runs he had more than one boarding house, he was boarding at Mrs. Booth's boarding house.
260 Q. He also boarded some in Gunthrie did he not?
A. He didn't have any room there, I guess he eat his meals there, but the place he had a room was in Paris, Tennessee.
Q. And when not in his boarding house and away from home he would get his meals wherever he happened to be?
A. Yes sir.
Q. How much insurance did you collect on his life?

(Objection by Att'ys for Pl'ff. Obj. overruled; to which Att'ys for Pl'ff excepts.)

A. Something over $5,000.
Q. How much over $5,000?

A. I can't tell you the exact amount without going into details.
Q. Isn't it true that you collected $5,000 on one policy?
A. No sir.
Q. What companies did you collect from?
A. The accident policy and the Engineers.
Q. How much from the Accident Policy?
A. $2,000.
Q. How much from the B. of L. E., Brotherhood of Locomotive Engineers?
A. $1500.
Q. What other insurance did you collect?
A. He had a policy in the New York Life.
Q. For how much?
261 A. That is the policy that I can't remember how much I collected from it, he hadn't been in that long, and I just collected a certain per cent of it.
Q. Have you no idea how much it was for?
A. No, I don't, I collected something over $1,000, but I can't tell you the exact amount.
Q. Is that all the insurance you collected?
A. That is all, yes sir.
Q. After your marriage to Mr. Stewart who lived in the family with you?
A. His mother.
Q. All the time?
A. Yes sir.
Q. Did he support her?
A. Yes sir, all but the property she owned, we lived in the house, she owned the property where we lived and we lived in the house with her.
Q. She was living at the time of his death?
A. Yes sir.
Q. Where is she now?
A. She is dead.
Q. She was dependent upon him for a support outside of you living in her house?
A. Yes sir.
Q. When did his mother die?
A. June 17th last year.
262 Q. 1913?
A. 1913, yes.
Q. What was her name?
A. Sarah A. Sherrell.
Q. What was your maiden name before you were married?
A. Janette Sands.
Q. When was your husband born?
A. March 9th 1874.
Q. You say that your husband owned no property at the time of his death. How long had he been running in the capacity of an engineer?
A. Something like three years I think.

Q. What position did he occupy with the Railroad Company prior to becoming an engineer?
A. Fireman.
Q. How long was he a fireman?
A. I expect you know more about that than I do, I expect seven or eight years, something like that.
Q. He earned more as an engineer than he did as a fireman did he not?
A. Yes sir.
Q. Do you know about how much more?
A. No, I don't.
Q. Do you know how much he earned as a fireman?
A. From about $75 to $85 a month, I can't remember.

Q. The little girl you spoke of in answer to Mr. Procter
263 as to the condition of her mind, you now have in your lap?
A. Yes sir.

Q. You have had that little girl in your lap all the time you have been testifying?
A. Yes sir.
Q. When you went upon the stand you took that little girl with you and had her on your lap then?
A. Yes sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Why did you have the little girl in your lap?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I had to bring her with me, I had no one to leave her with.
Q. Why did you have her in your lap when you were testifying?
A. I had to bring her with me, I don't know why I brought her in my lap, Iguess the little boy could have kept her.
Q. How far from you?
A. I don't know.
Q. In your immediate presence?
A. Oh, she is in my presence, yes sir.
Q. You spoke of Mr. Stewart contributing to the support of his mother, Mrs. Stewart, did Mrs. Stewart do any service in the family while living with you?

264 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. She helped me with the children.
Q. Did she earn any money of her own in any way?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. We did a little sewing together, I and her.
Q. Mrs. Stewart, who were those policies payable to?
A. To me.

(Recross-examination by Jas. C. Sims, Att'y for Def't:)

Q. The New York Life Policy, to whom was that made payable?
A. To me.
Q. Now the Accident Policy that you speak of?
A. It was payable to me.
Q. What Company was that in?
A. I can't tell you.
Q. The Brotherhood of Locomotive Engineers, how was that payable?
A. To me.
Q. Did you have the policies at the time of his death?
A. I had the policies, yes sir, all of them.
Q. Those policies you haven't now in your possession?
A. Why no, you have to turn them in.
265 Q. Are the children named in any of those policies?
A. No, sir.
Q. Is his mother named in any of those policies?
A. Yes sir.
Q. Which one?
A. In the Brotherhood of Locomotive Engineers.
Q. In any of the other policies?
A. No sir.

Testimony of James Theodore Stewart.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your age?
A. Eleven.
Q. Are you the son of W. H. Stewart?
A. Yes sir.
Q. How old were you when your father died?
A. About five years old.
Q. Do you remember him?
A. Yes sir.
Q. Do you remember when he died?
A. No sir.
Q. Do you remember when he was buried?
A. No sir I can't.
Q. Do you remember whether or not you were at the burying?
A. No sir.

266 Att'ys for Def't move to exclude the above testimony, which is sustained. And Att'y for Pl'ff excepts to the ruling of the Court.

Counsel for Defendant moves the Court to discharge the jury because of the exhibition of the idiotic child in the lap of the mother and in the presence of the jury and because of the appearance of the child, being that of a child without mind, tongue hanging out, and making faces in near proximity to the jury. Motion is overruled by the Court, to which Def't excepts.

Plaintiff offered to introduce the deposition of O. L. Hill, to which Defendant objected, and the Court ruled that O. L. Hill must be introduced in person, to which ruling Plaintiff excepted, whereupon the plaintiff called H. T. Jones and offered to read his deposition taken in the case, to which Defendant objected, and the Court sustained the objection and ruled that the witness must be examined orally, to which ruling Plaintiff excepted.

Testimony of H. T. Jones.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. I live here.
Q. How old are you?
267 A. Thirty-eight.
Q. What is your occupation?
A. Freight Conductor.
Q. How long have you held that position?
A. Since 1903.
Q. How long have you known W. H. Stewart?
A. Quite a number of years, ever since we were school boys together.
Q. Tell the jury what sort of man he was?

Objection by Att'ys for Def't. Objection overruled, to which Def't excepts.

The Court: "As to his habits of industry, sobriety, and economy."
A. My association with him was principally on the road, and he always struck me as being a sober and proper man for that kind of work.
Q. What sort of an engineer was he, what capacity did he have for an engineer?
A. He was a good engineer.
Q. How long have you been in the service of the Railroad Company?
A. Since January 8th, 1897.
Q. How long have you been running as freight conductor?
A. Since the summer of 1903.
Q. What is your run at present?
268 A. Chain gang, running both ways out of Paris, Tennessee.
Q. Does part of your run embrace from Paris to Bowling Green?
A. Yes sir.
Q. And thence South to what point?
A. To Memphis.
Q. How often does your duties bring you to Bowling Green?
A. Really I cannot say accurately.
Q. What was your run in September 1908?
A. Practically the same as it is now if I remember right, or it might have been strictly on this Division, I won't be sure.

Q. Paris is one of the terminals of your run, in the State of Tennessee?
A. Yes sir.
Q. Where were you on September 5th 1908?
A. On a North bound freight.
Q. What was the number of your train?
A. It seems that it was 114 if I remember right.
Q. Who was the engineer pulling you on that trip?
A. W. H. Stewart.
Q. Who was your crew?
A. O. L. Hill flagman, and W. C. Minor head brakeman.
Q. Who was on the engine?
A. Stewart, engineer, and Sorrells fireman.
Q. Do you remember taking the siding at Cumberland City to let Southbound passenger train pass, if so, what was the
269 number of that train?
A. 103.
Q. What was the movement of that train, W. H. Stewart's train, immediately preceding that injury?
A. After sawing 103 out it was necessary to back down to the South end of the siding to make room to clear the North end and at the same time to open the street and passenger crossings and while backing down the air was applied from the rear of the train.
Q. Did you have any conversation with Stewart, you were there present when that air was applied?
A. Yes sir.
Q. Was the train in motion when the air was applied?
A. Yes sir.
Q. Was it moving backward or forward?
A. Back.
Q. Who gave the signal to move back?
A. I did.
Q. You were the conductor in charge?
A. Yes sir.
Q. What position was Stewart in at the time?
A. At the right side of the engine at the cab window.
Q. Was he looking at you and receiving signals from you?
A. Yes sir.
Q. At the time the emergency was applied?
A. Yes sir.
270 Q. Was his head or any part of his body in or out of the window?
A. The best of my recollection his head was out of the window.
Q. Was he leaning in the window, was he touching the window sill?
A. Pollibly so, I can't be sure about that.
Q. But the best you remember his head was out of the cab?
A. Yes sir possibly leaning on the window sill.
Q. And looking out and taking signals from you?
A. Yes sir.
Q. Was that his proper position?

A. Yes sir.
Q. Was it his duty to be taking these signals from you as conductor?
A. Yes sir.
Q. Was it his duty to move in obedience to your signals?
A. Yes sir.
Q. Wasn't it his duty to move back until he got another signal?
A. If they was considered the proper signals he should, yes sir.
Q. After you gave the signal to back it was his duty to move in obedience to the signal until he got another signal?
A. Unless something prevented in the way of emergency.
Q. If he was stopped it was not his duty to move further?
A. If he should see a car derailed, or stock, or anything, it was his duty to stop, that is what I mean.
271 Q. While he was moving backward was he stopped in any way?
A. Yes sir.
Q. Did you give him a signal to stop?
A. No sir.
Q. How was he stopped then?
A. By the application of the air brakes from the rear of the train.
Q. Who did that?
A. O. L. Hill.
Q. What effect did the application of the air have?
A. It stopped the train.
Q. Stop it suddenly or gradually?
A. Suddenly.
Q. What effect did that have on the train?
A. A sort of jerking effect.
Q. You saw the cars stop when the emergency was applied?
A. Yes sir.
Q. Were you watching Stewart?
A. Watching him and the train at the same time.
Q. Do you know what effect it had on him?
A. No sir.
Q. On Sorrells the fireman?
A. No sir.
Q. Did you see him thrown against the side of the cab?
A. No sir.
Q. Did you immediately thereafter have a conversation with him about the effect on him?
272 A. No sir.

(Objection sustained.)

Q. After the emergency was applied what was next done?
A. We proceeded with the work like we started to do.
Q. What work?
A. Backing down and making room and cutting the crossings for passengers to pass.
Q. Had 103 passed?
A. No sir there was a freight train there ahead of 103.

Q. The freight had passed out?
A. It had passed but we had to saw them out you understand.
Q. That caused you to go into the side track, and you had to clear the upper end of the siding for 115. What was the length of that siding?
A. About 32 car lengths or possibly 34.
Q. Have you any books to show the length of that siding?
A. No books, but it may be shown by the Time Card.
Q. Have you the last Time Card with you?
A. No sir.
Q. How many cars did you have in your train?
A. Thirty-three or thirty-four to the best of my recollection.
Q. How many cars did you find on the siding when you got to Cumberland City?
273 A. I don't remember, there was some.
Q. What became of those cars?
A. We shoved them ahead of us as we went through the siding.
Q. Was there as many as three?
A. Possibly so, I can't be sure.
Q. There was more than one?
A. I won't be certain.
Q. As near as you can recollect?
A. You see we don't charge our memory with those things, because we don't consider them of any importnace, but there was some cars.
Q. And you pushed them out on the North main?
A. Yes sir.
Q. You had to do that because you had to let 115 out South, that was the freight?
A. Yes sir.

(Objection to question because leading. Objection overruled, to which Att'ys for Def't except.)

Q. After 115 had passed the next movement you made was to back to clear the North end, and that was when the emergency was applied?
A. Yes sir.
Q. Where was Minor at that time?
A. It seems to me that he was near the head end of the
274 train possibly at the switch or near the North switch.
Q. That is a straight track, isn't it?
A. No, there is a slight curve in the siding, and the curve is North of the North switch.
Q. That is where it leaves the main track?
A. No, at a point right near the passenger station there is a slight variation, it widens out and comes out to the main line again.
Q. The main line is straight there between the points of the siding isn't it?
A. Yes sir practically straight.

Q. At the time you were giving these signals where were you standing?

A. At a point near the end of the train within good range of vision, I don't remember how close.

Q. Do you mean at the end of your train?

A. I could see both ends.

Q. You could see the entire track?

A. The entire train, yes sir.

Q. Now Minor, when that train stopped there and fouled the main, did any person send Minor away?

A. I sent him away in time to protect against 103.

Q. Did you have a meeting order for 103?

A. No meeting order. I met them on Time Card schedule, it was as far as I could make.

Q. Under the Rules of the Company how long do you have to clear the main?

275 A. Five minutes.

Q. Did you have the full clearance time when you went in?

A. More than the clearance.

Q. Do you remember what time you got in at Cumberland City?

A. Plenty of time to let the freight train out and to let 103 by.

Q. Were you on schedule time at that time?

A. I don't know.

Q. Didn't your train run on a schedule?

A. It run on a schedule, but it could be several hours late, without losing its rights, freight trains don't always run on schedule time but may still be on their own schedule rights.

Q. Isn't it true that you got there about 9:25?

A. I think so.

Q. And the passenger train was due about 9:30?

A. 9:36.

Q. You had ample time to back in there and let the freight train out and back in and let 103 by, before 103 was due there?

A. Yes sir.

Q. How far did your train back before the emergency was applied, Hugh?

A. I couldn't state that accurately.

Q. About?

A. Possibly a car length, or maybe a car and a half, I can't say.

276 Q. What speed was it backing at, at that time, as much as two or three miles an hour?

A. Something like that.

Q. Had 103 arrived and was ready to go out before you commenced backing down?

A. No sir.

Q. How long until it arrived?

A. Several minutes.

Q. Was that the object in backing as you were doing at that time, so 103 could pass?
A. Yes sir.
Q. Were your cars at the North end, was the main track still fouled at the time this emergency was applied?
A. I can't state that accurately whether it was or not.
Q. Your best judgment?
A. Possibly it was, but not very much.
Q. But your best judgment is that you had not sufficiently cleared the North end for 103 to pass in safety there?

(Objection sustained.)

A. It may, or may not have been, I can not say.
Q. What is your best recollection?
A. Well, I don't remember.
Q. But you did have 33 or 34 cars in your train?
A. Yes sir.
Q. That is what you came into Cumberland City with?
277 A. Yes sir.
Q. Have you got a Time Card with you that will show the length of that siding?
A. No sir.
Q. Have you a Time Card that will show it?
A. I have it in my caboose.
Q. Haven't you one at home that will show it?
A. No sir.
Q. Has there been any changes made in that siding there?
A. I don't think there has, since that time.
Q. When was that change made in that siding *made*, Hugh?
A. I don't know, can't remember.
Q. Ten or twelve years ago?
A. I couldn't say.
Q. Is it the same now as it has been ever since you have been at work on the road?
A. No sir.
Q. How long have you been at work on the road?
A. Seventeen years.
Q. When was that change made in that siding?
A. I don't remember.
Q. Was it prior to 1902?
A. Mr. Scates can give you the data on that.
Q. Don't you know that that siding only cleared 18 cars according to your own statement?

(Objection sustained.)

278 Q. Here is a List of Stations, No. 530, Oct. 15, 1912. You say there has been no change made there since? Isn't that the List of Stations and names of Agents up to October 15, 1912, if so, look at that and tell the jury how many cars that siding will hold as shown there?

(Att'ys for Def't object to the introduction of the book contain-

ing the statement above referred to. Objection overruled; to which Att'ys for Def't except.)

Q. I now show you a book upon which it is printed "Louisville & Nashville Railroad Company. List of Stations and Names of Agents, No. 530, Oct. 15, 1912," examine that Mr. Jones, and see if that is a correct statement of the stations and of the clearance length of sidings in feet as issued by the L. & N. Railroad Company for the information of its Agents?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. These books are handed to us by our officials and are supposed to be correct. This shows Cumberland City with a clearance of 720 ft. Now the length of cars vary.

Q. That is estimated at 18 cars, isn't it?

A. Yes sir.

279 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How many cars is that estimated to hold?

A. It would depend on the length of the cars.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How many cars on the Time Card?

A. The number of feet is divided by 40, just the length of each car, it would depend on your individual train as to how many cars, you can go into a siding at any time.

Q. Vary in what, length?

A. Owing to its capacity.

Q. What was the capacity of the cars on that occasion?

A. Possibly 60,000 lbs., and the average length is about 36 ft. possibly, that is the clearance length.

Q. Did that exclude drawheads and couplings?

A. Yes sir.

Q. How much space would each car take on the track?

A. That would depend upon whether they were drawn out or bunched in and the springs closed.

Q. How much difference would that make in the length of the clearance of a car?

A. In that length of train it would make 40 ft. possibly.

Q. That would be about 3 or 4 inches to the car?

280 A. That would be about 40 ft. to the 34 cars.

Q. That would be over a ft. to the car?

A. Yes.

Q. Who was managing and controlling that engine and train at the time this emergency was applied?

A. Engineer Stewart was handling the engine.

Q. Who was controlling it with signals?

A. I was giving the signals.

Q. Who had control of that train?

A. I was in charge of it.
Q. In what cases is it proper railroading to apply the emergency?

(Objection by Att'ys for Def't. Objection sustained; the Court ruling that the Rule as to that, must be introduced.)

Q. I here show you a green book on which is the following endorsement: "Issued to W. H. Stewart, employed as Engineer C. Division, 6/10/1908, L. & N. Railroad Company. Special Rules Concerning the use of Air-Brake and Whistle Signals. Revised January 6th, 1908." Is that the Book of Rules in effect at that time?
A. Concerning the Air-brakes, yes sir.
Q. Now as I understand there is a brake valve in the engine and a conductor's valve in the caboose. When the train is in motion the caboose is the rear car in the train?
281 A. Ordinarily, yes sir.
Q. There is a valve in the engine by which the engineer can apply the air and stop the train, and a conductor's valve on the caboose from which he can stop the train, it can be stopped from either end?
A. Yes sir.
Q. The *the* angle cocks can open up the air line or shut off the air line, and one of these angle cocks are on the rear end of each car?
A. Yes sir.
Q. I will show you the rule on Page 18 and ask you whether or not that rule was in effect at that time?
A. Do you wish me to read the Rule?
Q. Yes sir.

(Rule is here introduced in evidence by Att'y for Pl'ff and witness reads said Rule, which is as follows:
Rule on page 18 from book "Special Rules governing the Use of Air Brake and Whistle Signal, Revised Jan. 6, 1908.
Rule: "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Q. Now what is the usual and customary way of applying that emergency, by whom is it ordinarily done?

(Objection by Att'ys for Def't. Objection overruled; to
282 which Att'ys for Def't except.)

A. The emergency is applied ordinarily by the first person who sees danger and get to the valve. If the engineer sees it first he will apply it first. If the engineer does not see the danger, and it is observed from the rear of the train, then the flagman or conductor will apply it.

Q. In the ordinary running and usual course of business, who is it that applies it?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The emergency is not a usual proceedure, it is an unusual proceedure.

Q. And the Rule there depends upon the character of cases?

(Objection sustained. Rule speaks for itself.)

Q. Mr. Jones, I will show you another book upon which is printed "Revised Rules for the Government of Transportation and Telegraphic Department and for Movement of Trains by Telegraphic Orders. L. & N. R. R. Co.," which contains the following general notice: "It is of the utmost importance — General Manager's Office July 1st, 1892, reissued August 22, 1907, B. M. Starks, Gen. Manager." Is that the book of Rules in effect at that time?

283 Mr. Sims: "That part that he was reading we move to exclude."

Mr. Procter: "That is just to identify the book."

Q. Is that the Book of Rules that was in effect at the time of this occurrence on Sept. 5th, 1908?

A. Yes sir.

Q. You, yourself, don't know the condition of those switches and crossings at the time of this application of this emergency, if so, tell the jury?

A. The switches were lined for the main and the crossings were blocked.

Q. Was the train in the clear at the South end of the switch at that time?

A. Yes sir.

Q. At the time the Emergency was applied?

A. I think it was.

Q. You were at the far end of the siding?

A. No sir, I was at a point near the engine.

Q. The engine was at the North end or near the North end of the siding and the emergency was applied near the South end of the siding.

A. Yes, sir, at the South end.

Q. Did you have a conversation with Stewart after this emergency was applied?

(Objection by Att'ys for Def't.)

284 The Court: "You can ask him how long afterwards?"

Q. How long after this emergency was applied before you had this conversation with Stewart?

The Court: "He has not said he had any."

Q. Did you have a conversation with him after this emergency was applied?

A. Yes sir.

Q. What time had intervened between the time of this application of emergency and the conversation?

A. Well, after the emergency was applied and the angle cock closed, and the brakes was released, and we continued backing down far enough to cut the crossings and the crossings were open, and it was either on the way to or from the telegraph office that we were talking.

Q. Had 103 passed?

A. No sir, it hadn't come yet.

Q. You were backing down to let it pass at the time the emergency was applied?

A. To cut the crossings and at the same time clear 103.

Q. How long was it after this emergency was applied before you had this conversation with Stewart?

A. Several minutes.

Q. About how long?

A. It might have been as much as 10 or 15 minutes, possibly not so long.

285 Q. Your best judgment, was it as much as 10 minutes?

A. We had to wait for the brakes to release and move the train back, and open two crossings.

Q. Are you certain you opened the crossings before you had this conversation?

A. Yes sir because that was the first thing to be done.

Q. Why did you want to open the crossings then?

A. To comply with the State law that the crossings was not to be blocked over five minutes.

Q. Do you know any Tennessee law to that effect?

A. We have instructions to that effect.

Q. Where are they?

A. In the caboose.

Mr. Procter: "I move to exclude that, as I have not asked for that, I was not asking for any Tennessee law and he gave that, and I ask them to produce these instructions."

A. I will answer that by saying that we have instructions not to block any longer than is necessary, whether it is one or two minutes.

Q. Then you can go back and block them as long as necessary?

A. No sir we don't do that regardless of delay to trains.

Q. Are those instructions in writing?

A. Yes sir.

Mr. Procter: "I will ask your honor to exclude that testimony."

286 The Court: "He is your witness, and the declaration is in chief."

Mr. Procter: "It is competent if there is no written instructions, but when I find that the instructions are in writing, then I have the right to call for those."

The Court: "Let the answers stand, they are coming from your own witness."

Mr. Procter: "I will ask your Honor to instruct the witness to produce these written instructions."

The Court: "If he has them, he can bring them but the answer must stand in the record."

Q. What was that conversation between you and Stewart?

(Objection sustained.)

Att'y for Pl'ff makes the following avowal: "We expect the witness to state that he had a conversation with W. H. Stewart in a few minutes after this emergency was applied in which he said 'We were backing down or rather up for the purpose of cutting the crossing when the air brake was applied from the rear end of the train' and in the conversation with him he remarked "That was a
287 bright trick your flagman did and remarked that he was hurt in the shoulder by striking it in some way against the cab."

Q. What was he referring to when he said that was a bright trick your flagman did?

Objection sustained.

Att'y for Pl'ff makes the following avowal: "The witness would state that he was referring to the angle cocking of the train from the rear end."

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Where do you live?
A. Here.
Q. How long have you resided in Bowling Green?
A. Born and raised here.
Q. Practically lived here all your life?
A. Yes sir.
Q. Are you a married man?
A. Yes sir.
Q. Does your family live here?
A. Yes sir.
Q. Cumberland City is how far from Clarksville, Tenn.?
A. About 21 miles.
Q. North, or South?
A. South.

Q. Your run in 1908, was that the same as Stewart's run?
288 A. You mean that we were both working on the same Division?

Q. Yes.
A. Yes sir.
Q. Did you run between the same points that he did?
A. Well, now, at times I ran South of Paris, and it is my recollection that he only run between here and Paris.
Q. Now on his run there was a loop, that is to say he would run from Bowling Green to Paris and from Paris to Guthrie back North again and then turn and return to Paris, before he returned to Bowling Green?
A. That was very frequently done.

Q. When such runs as that were made, they would keep him out on the road some three or four days would they not?

A. Not if the run were continuous, all one straight trip.

Q. How long would he be away from home under such circumstances?

A. Well, possibly three or four days.

Q. In the case of such trips, railroad men who do take such trips, do they have boarding places in Paris?

A. Yes sir.

Q. Mr. Jones, as an experienced railroad man, running on that Division, in your judgment, what would be the expenses of an average man such as you knew Mr. Stewart to be while out on those trips and away from home engaged on his runs?

A. I should think on an average of $15.00 to $20.00 a month.

Q. He would get his meals wherever he happened to be at meal time?

A. Yes sir, if he had a chance.

289 Q. And would stop over night at his boarding place at Paris when it was necessary?

A. Yes sir.

Q. You were coming North on September 5th, 1908, when you reached Cumberland City?

A. Yes sir.

Q. Did you reach Cumberland City in the forenoon or afternoon?

A. Forenoon.

Q. I believe you said you could not state the time?

A. No, I know it was in the morning.

Q. When you reached Cumberland City was there a train standing there on the Main track?

A. My best recollection there was either a freight train there at the time or it came soon afterwards.

Q. On what track did you enter Cumberland City?

A. The first track, the siding.

Q. You entered far enough on the siding to clear the main track and let the train then there pass on South, didn't you?

A. Yes sir.

Q. In order to do that you had to clear the main track with your train at the South end of that switch?

A. Yes sir.

Q. What do you mean by clearing the main track with your train at the South end of that side track?

290 A. Moving in sufficient for the other train to pass without damage.

Q. In every switch there are switch points and a frog, are there not?

A. Yes sir.

Q. The frog is where the rail of one track is crossed by the rail of the other?

A. Yes sir.

Q. And the point of the switch is the final end of the switch?

A. Yes sir.

Q. What is the difference between the frog and the point of the switch?

A. Possibly 50 ft.

Q. It run some distance?

A. Yes sir.

Q. Isn't it a fact, Mr. Jones, that to get your train, say your caboose at the hind end of your train absolutely in the clear of the main track you had to run up some distance from the switch?

A. Yes sir.

Q. In your judgment how far Northward from the frog of the switch or the switch point would you have to run in order to absolutely clear your train of the main track?

A. Possibly 120 or 130 ft.

Q. The reason of that Mr. Jones, is it not, that the switch rail gradually leaves the rail of the main track and gets a further distance?

A. Yes sir.

291 Q. But that is very gradual and you have to come up some distance before adjoining trains will absolutely clear each other?

A. Yes sir.

Q. When the train that you found at Cumberland City had pulled in South then you expected from the North the passenger train 103, a fast passenger train going to Memphis?

A. Yes sir.

Q. You had to let your train on to the main track at the North end of the switch?

A. Yes sir.

Q. You told Mr. Procter that you found some cars or a car on the siding when you pulled in to it?

A. Yes sir.

Q. Did you push those cars ahead of the engine as you entered it?

A. Yes sir, pushed them ahead.

Q. In order to clear the North end of the switch so as to admit the passenger train you had to back Southward?

A. Yes sir.

Q. Where was your head brakeman at that time?

A. At a point near the head end of the train.

Q. Had you sent him up there?

A. He was ahead there, he has to be there.

Q. Did he have any duties as to the protection of 103?

A. Later he did.

292 Q. To show 103 that your train was there and not in the clear?

A. Yes sir.

Q. Then you gave the signal to the engineer to back?

A. Yes sir.

Q. If I understood you, the purpose of that signal was to clear the North switch so as to admit 103 and to cut or clear the crossings you have mentioned?

A. That is right.

Q. Now coming north, that siding is on which side of the main track?

A. Left side.

Q. And I believe you said the main track was practically straight right at Cumberland City?

A. Yes sir.

Q. On which side coming North is the depot or station?

A. Left side.

Q. Between the side track and river?

A. Yes sir, between the siding and Cumberland River.

Q. Across the side track from the main?

A. Yes sir.

Q. These crossings you speak of, one is a passenger crossing towards the North portion of the switch to let passengers back and forth to the station, and to the wharf on the river, and then the middle crossing that admits passengers or wagons, and further towards the South end is another crossing?

293 A. Yes sir.

Q. And you were up towards the head of that train standing on the main track?

A. Yes sir, standing on the main.

Q. And you gave the signal to the engineer to back?

A. Yes sir.

Q. Where was the flagman? O. L. Hill?

A. At a point near the rear of the train.

Q. When you gave the signal to back for the purpose of clearing the North end of the switch and cutting the crossing, was it your intention to leave the siding?

A. No sir.

Q. Did you expect to continue, was it your purpose controlling that train with your signals to continue the backing of that train until it entered the South switch?

A. No sir.

Q. Or one end of the main track at the South end?

A. No sir, not if it could be avoided.

Q. You could have avoided it by your signals, by stopping the train?

A. Yes sir, easily.

Q. The caboose at the South end can get out of the clear, or to state it differently, may foul the main track without ever entering upon the switch at all, in fact would be some distance from the switch?

A. Yes sir.

294 Q. If the caboose had run upon the switch it might have split the switch points mightn't it?

A. It would split them.

Q. You had no purpose to permit that to occur?

A. No sir.

(Objection by Att'ys for Pl'ff. Obj. overruled; to which Att'ys for Pl'ff except.)

Q. State whether or not splitting the switch and running out upon the switch might possibly have the effect of derailing the car?

(Objection sustained.)

Q. What would be the possible or probable effect?
A. It would split the switch and probably derail the car.
Q. Would it damage or injure property?
A. Yes sir.
Q. You have stated that it was your purpose in backing to clear or cut the crossing, could you have accomplished this purpose, and was it your judgment that you could accomplish this purpose and still keep your caboose from splitting the switch at the South end?
A. To the best of my recollection I could have done so.
Q. That was your judgment at the time?
A. That was my judgment at the time.

295 Q. Now is there an air-brake on the caboose or was there of that train, air valve?

A. I don't remember exactly when those valves were put on the inside of the caboose. The air was connected under and at the rear of the caboose by the train line before it was cut out by the rear angle cock.
Q. That is nothing but an air-brake at the end of the caboose?
A. It is a cut out point.
Q. A stop cock is it?
A. Yes sir.
Q. Your train was operated by a number of air-brakes?
A. Yes sir.
Q. The engineer could use them in the cab, and you or the flagman could employ the same air at the rear end of the train?
A. Yes sir.
Q. When the air brake was applied at the rear end of the train in the instance in question, I believe you said there was a jar of the train?
A. Yes sir.
Q. Which followed upon its stopping?
A. Yes sir.
Q. State whether or not there are such jars usual and incident to and customary to the operation of such freight trains on that road?
A. Practically every day.

296 Q. State whether or not the air or emergency air as it has been called, is applied frequently or not, in the ordinary operation of such trains on that Division?

A. Well now the emergency or conductor's valve which has been put in since that time, is used for stopping trains from the rear instead of the old angle cock, and those stops are frequently made when from any reason the signal is not being able to be given to the engineer in time to make a stop.

Q. Or if a signal is not obeyed?
A. Or if it is not obeyed, yes sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. I wish you would get your last time card and these instructions about blocking the crossings and get them back here?
A. I can not get those instructions without getting in communication with my officer.
Q. You can get that Time Card anywhere?
A. Possibly so, if they have an extra copy.
Q. There are plenty of engineers here that have them?
A. Yes sir they are all supposed to have them, but these instructions about blocking the crossings I don't know whether I can get that here at once or not.

297 *Testimony of W. C. Minor.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. What is your age?
A. Thirty-eight.
Q. What is your occupation?
A. Braking.
Q. Where do you live?
A. Here.
Q. What is your run?
A. From Bowling Green to Paris.
Q. Where were you on September 5th 1908 when W. H. Stewart was hurt?
A. At Cumberland City.
Q. What were you doing? What crew were you on?
A. I was braking for Conductor Jones.
Q. Where were you coming from at that time?
A. From Paris to Bowling Green.
Q. Who was your engineer?
A. W. H. Stewart.
Q. How long have you been railroading?
A. Ten years and a little over.
Q. In what capacity?
A. I was brakeman for a while and then promoted, and now I am braking again.
Q. How long were you conductor?
A. I don't remember exactly.
298 Q. Between what points were you conductor?
A. On all branches of the Memphis line in freight service.
Q. What time did you leave Paris on that trip?
A. I don't remember.
Q. Who was your fireman?
A. Sorrells.
Q. Who was Conductor?
A. H. T. Jones.

Q. Who were the brakemen?
A. O. L. Hill and myself.
Q. What was your position at the time?
A. Braking ahead.
Q. What was the position of Hill?
A. Flagging.
Q. What took place at Cumberland City on that trip, tell it in your own way?
A. We made Cumberland City and headed in there for 103 and the siding didn't clear us and of course 103 had to be flagged, and I was supposed to do the flagging for 103 and I don't know what else to say there exactly.
Q. Did you see the conductor give any signal to the engineer there?
A. As well as I remember I did, a back up signal.
Q. Where were you then?
A. Just ahead of the engine.
Q. Where was the conductor?
299 A. Not far from the engine as well as I remember.
Q. What signal did he give him?
A. Back up signal.
Q. What did the engineer do?
A. He obeyed the signal.
Q. Tell how the engineer answered the signal?
A. As well as I remember, three short blasts of the whistle.
Q. What is that the signal for?
A. That the train will be backed.
Q. What did Sorrells do then?
A. I don't know.
Q. What was it his duty to do?
A. It was his duty to ring the bell.
Q. As you were backing and as long as the train continued to back?
A. Yes sir.
Q. After that signal was given did the train start to back?
A. Yes sir.
Q. How far did it back?
A. I don't remember.
Q. What stopped it?
A. Why the brakes he put on from the rear, the brakes were set to stop the train.
Q. What sort of an application do you call it?
A. Emergency I suppose.
Q. You know, don't you?
300 A. Yes sir.
Q. What was it?
A. Emergency.
Q. Who did this?
A. Supposed to be O. L. Hill, he was flagging the car.
Q. Was it aplied from the rear, engine, or where?
A. From the rear.

Q. Who was there to apply it?
A. Mr. Hill I suppose, I didn't see anyone else.
Q. Did you see him when he made the application?
A. No sir.
Q. Did you see him immediately before?
A. Don't remember that I did.
Q. What were you doing at the time that he made this emergency application?
A. Standing just ahead of the engine fixing to go flag 103.
Q. What effect did it have on the train when he applied the air?
A. Stopped the train at once.
Q. What sort of jar or jerk did it put on the train?
A. Well, it would put a jar on there as quickly as any emergency application.
Q. Tell what sort it was?
A. That is as good as I can give it—the train would be stopped at once.
Q. How fast was that train going back at the time?
A. I don't know.
301 Q. How far did they back?
A. I don't know how far, not very far.
Q. As much as a car length?
A. I don't know, can't say, it has been a good while ago.
Q. Was your train in the clear at the North end? I mean when he applied the emergency.
A. It was not in the clear when he went to backing.
Q. Do you know how many cars you had?
A. I don't remember.
Q. Did you push any cars out of the siding?
A. Yes sir there was cars ahead of the engine.
Q. How many?
A. I don't know.
Q. More than one?
A. I can't say how many, there was several cars though.
Q. What effect did it have on the engine and those cars there. tell how much it was, how much jar was there, I mean the train and the engine?
A. It would be a jar equal to any emergency application of the brakes.
Q. Well, you understand?
The Court: "The jury don't know what that is, you can describe it."
A. I don't know how to describe it. It is just a sudden stop, all the brakes were turned on and set in emergency and that
302 made an immediate stop.
Q. Well, does that cause a heavy jar in the train?
A. Well I should think so, to a certain extent.
Q. Did you see Stewart at the time the jar came?
A. Yes sir.
Q. What was he doing?

A. I think as well as I remember he was hanging out of the window.

Q. What was he doing?

A. Looking for signals I suppose.

Q. Who was giving the signals?

A. The conductor.

Q. You had gone forward for the purpose of protecting 103?

A. A short distance, yes sir.

Q. Did you hear Stewart complaining after that of being hurt?

(Objection by Att'ys for Def't.)

The Court: "Right at the time, immediately after, if you saw him or observed him, you can state."

Q. Did you see him after that was applied?

A. Saw him all the way from there on.

Q. What was his condition?

A. I couldn't say, he complained at Clarksville about this, said it was a heavy jar on him.

(Objection sustained, as to what he said.)

303 Q. From his appearance could you tell whether or not he seemed to be suffering?

A. I don't know that I could, he was of a delicate nature any way, and a man complaining, you know——

(Objection sustained.)

Q. How long have you run as a brakeman and as a conductor?

A. Both?

Q. Yes.

A. I have been here a little over ten years.

Q. Was it usual and customary to apply the air brakes and put the train in emergency from the rear of the train?

A. Not ordinarily, no sir.

(Objection by Att'ys for Def't.)

Q. How is that ordinarily done, if it becomes necessary to set them in emergency?

A. From the conductor's valve in the caboose.

Q. Was that usually done by the conductor or the engineer?

(Objection by Att'ys for Def't.)

A. It would not be done by the engineer, for he would not know for what purpose they were using this emergency, it had to be done by the conductor.

Q. I am talking about how it is done, isn't it a fact that it is usually applied by the engineer?

304 (Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It has been done by the engineer, but in a case of emergency from the train crew, it is done by the conductor in the caboose.

Q. Then it is proper for a man to apply it from the rear?
A. Yes sir.
Q. In all your experience how many times did you ever apply the emergency?
A. I can't say how many.
Q. Did you ever apply it?
A. Yes sir.
Q. How many times?
A. I don't know, I know I have used it a time or two.
Q. Tell under what circumstances you used it?

(Objection by Att'ys for Def't.)

The Court: "Well, let him state what is the proper and ordinary use of this application."
Mr. Procter: "I want him to illustrate the character of danger that justifies the use of emergency."
The Court: "The Rule there states danger to property or life."
Objection is sustained.

305 Q. You say that you had to saw by for 103?
A. Yes sir.
Q. Wasn't 115, South Bound, waiting for you at the time?
A. I don't remember.
Q. But you do remember going out flagging 103 and stopping 103?
A. Yes sir.
Q. That was the reason that the North end of the track was foul?
A. Not necessarily, the South end could be foul.
Q. At any rate the main track was foul at one end?
A. Yes sir, the main track was foul.
Q. What Rule of the Transportation Department governs you in that instance?
A. You must be protected against opposing trains.
Q. What is the number, isn't it 99?
A. Yes sir, Rule 99.
Q. At the time this emergency was applied, for what purpose were you flagging?
A. To get in the clear at the North end of the siding.
Q. Why did you want to clear that?
A. So the passenger train could pass down the main line.
Q. And you were at the head of the train for that purpose?
A. Yes sir.
Q. I will ask you this question: Please describe as fully as you can the character of cases where it would be prudent and proper for a railroad brakeman to apply the emergency, when the conductor and engineer are both in charge?

306 (Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the witness to say "In case of a break-down or car leaving the track, brake beams down, or in danger of killing some one."

Q. What is the length of that siding there?
A. I don't remember the length.

Q. Do you mean to say that you are conductor, and don't remember the length of the siding?

A. Many of the sidings are extended, and that one has been, we have a Time Card showing the length of the sidings, there is a Time Card in all cabooses.

Q. And you as conductor have run by all of those?

A. It has been four or five years ago that I run a train.

Q. Then you acted as flagman?

A. I have flagged some.

Q. Don't you know the length of every other siding on that road?

A. No sir.

Q. Don't you know that the length of that siding is 720 ft.?

A. No sir I do not.

Q. Are you familiar with this book, "List of Stations and Names of Agents", have you seen that book before?

A. Yes sir.

307 Q. Don't that give the correct list of the sidings, all of them?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Don't that give the length of that siding?

A. Yes sir.

(Objection sustained.)

The Court: "Jones read that from the book, 720 ft.?

Q. That is the correct length then of that siding at Cumberland City?

(Objection sustained.)

Q. As shown by the book?

A. As shown by the book, yes sir.

Q. How many cars were in your train on that occasion?

A. I don't remember.

Q. Do you remember what time you got there?

A. Not exactly, no sir.

Q. About what?

A. Not far ahead of 103 time.

Q. What is 103's time?

308 A. 9 something, the Time Card changes, I don't remember exactly.

Q. About how far ahead of 103's time?

A. I can't say how many minutes, not very long though ahead of 103.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you been railroading?

A. A little over ten years between 10 and 11 years.

Q. What business did you do before you began to railroad?
A. Farmed.
Q. Are you a married man?
A. Yes sir.
Q. You have been running on the Memphis Division then haven't you?
A. Yes sir.
Q. Numerous sidetracks are along that Division?
A. Yes sir.
Q. Isn't it absolutely impossible for you or any man to carry in his head the length of all of those sidings?
A. That would be hard to do.

Q. You said Mr. Stewart was a man of delicate nature, you
309 mean physically delicate?
A. Yes sir.

Q. Prior to this Cumberland City affair did you ever hear him complain about his health?
A. Yes sir.
Q. Do you know of his taking medicine before that?
A. Yes sir.
Q. Did you ever see him take it or hear him speak of taking it?
A. I never seen him, he asked me to get him some medicine at Big Sandy, and I didn't have time, and I got it at Erin just a short while before we reached Cumberland City.
Q. On this trip?
A. It was, as well as I remember.
Q. He sent you at Big Sandy to get some medicine for him?
A. Yes but I didn't get it at Big Sandy and I got it at Erin.
Q. You got the medicine for him before he ever reached Cumberland City and on the same trip?
A. Yes sir, as well as I remember.
Q. Prior to that time, did you hear him complain of his health?
A. I don't know that I can state any special time.
Q. Generally, have you heard him complaining from time to time?
A. Well, yes sir, more or less.
Q. When you first pulled in at Cumberland City, you let the train go South that was then there?

310 A. I don't remember about that train being on the siding.
Q. At any rate you expected 103 to come in?
A. Yes sir.
Q. And you were out to protect against that train?
A. Yes sir.
Q. You saw the conductor give the signal to back the train?
A. Yes sir.
Q. That was the purpose, to clear the North end of the switch?
A. Yes sir.
Q. Was there any crossings at Cumberland City near the passenger station?
A. Yes sir, one near the passenger station.

Q. Is the passenger station on the opposite side to those two tracks?

A. Yes sir, between the siding and the river.

Q. So for people to reach the station they have to cross both tracks?

A. Yes sir, to reach the station.

Q. You saw the train come to a stop when it was being backed?

A. Yes sir.

Q. By application of the brakes?

A. Yes sir.

Q. There is and there was on that train a means of applying the brakes, not only on the engine but in the caboose, and also at the rear of the caboose, and in the caboose called the conductor's
311 valve?

A. Yes sir.

Q. And at the rear of the caboose it is called the angle cock?

A. Yes sir.

Q. Now you can stop the train by the application of this air, by the application of those air brakes, either on the engine, or in the caboose, or at the rear of the caboose?

A. Yes sir.

Q. I believe you told Mr. Procter that there was a jerk or jar when it came to a sudden stop?

A. Yes sir, the same as any emergency application of the brakes.

Q. Moving fast or slow?

A. Slowly, I don't know how fast.

Q. Did you see the jerk or jar of the train when it stopped?

A. Yes sir.

Q. As an experienced railroad man state whether or not in the operation of freight trains there are not naturally a lot of jerks and jars that can not be avoided, and which occur at any and all times in the operation of such trips?

A. Yes sir.

Q. Said jerks and jars, are they or not usual and customary in the operation of such trains?

A. Yes sir.

Q. Tell the jury whether or not this jar was like or similar to such other customary and ordinary jars in the operation
312 of freight trains?

A. I should think so, any emergency application of the brakes would be the same as this.

Q. In stopping a freight train are there any jerks and jars?

A. More or less, yes sir.

Q. In pulling it out are there any jerks or jars?

A. Yes sir.

Q. In going down a swag, or fill, or a dip, are there any jerks or jars?

A. Yes sir.

Q. What kind?

—. ——.

A. In going into a dip as they go together there is a jerk and in

going down the descent there would be another jerk of the slack running out of the train?

A. Yes sir.

Q. Was the jar on this occasion such as is experienced on any other such occasion as that?

(Objection sustained.)

Q. State how frequent you meet with such jars as you saw on that occasion in the operation of freight trains?

A. That is very frequently that jars come like that, especially in any kind of trouble like that.

Q. Does that happen frequently or otherwise?

A. It would happen frequently you might say, in any
313 kind of trouble when you would want to stop at any time.

Q. State whether or not such jerks and jars as you saw on that occasion, happen and occur almost daily in the operation of such freight trains?

A. Yes sir I see it frequently.

Q. I show you a blue book which Mr. Procter read from, "L. & N. R. R. Co. Special Rules Concerning the Use of Air-Brakes and Whistle Signals, Revised Jan. 6th 1908" from which he read the following clause on page 18: "The emergency or quick action must never be used unless to avoid injury to life or property. No excuse will be taken for its use except as stated. The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired. I direct your attention to the latter portion of that and ask you whether that can have any application to the applying of the angle cock?

A. No sir.

Q. To what does it apply?

A. To the engineer's valve on the engine.

Q. To what do these words apply "turn the handle to lap"?

A. That applies to the engineer's valve on the engine. It can be held open until the train stops.

Q. That applies to the engineer?

A. Yes sir.

314 (Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Rodes asked you about the condition of Mr. Stewart's health and you say that you heard him complaining of that jar on this trip, are you certain about that, that you heard him complaining of being sick on this trip?

A. I got him medicine on that trip.

Q. Didn't you tell them that you didn't get it?

A. No sir, I beg your pardon, I said I didn't get it at Big Sandy but got it at Erin.

Q. What sort?

A. I don't remember, they were some kind of tablets I got at the drug store.

Q. What drug store?
A. A. J. Mitchell's.
Q. Did you ever get him medicine only on that trip?
A. I am not sure it was, except he was injured at Cumberland City, and I heard him complaining at Clarksville.
Q. Aside from that, did you ever hear him complaining at any other time?
A. I don't know, I stated the time that I heard him.
Q. Wasn't you asked this question, to refresh your recollection you gave your deposition in this case March 25th 1902, did you not?
A. As well as I remember, yes sir.
Q. Page 73. Wasn't you asked this question: Q. How long had you known W. H. Stewart at that time? A. Ever since I
315 have been on the road. Q. What was the condition prior to this time, I mean the condition of his health? A. I don't know sir." Is that right?
A. I believe it was, I am not sure, it has been some time ago.
Q. And this question: "Of what did you hear him complain? A. I don't know sir. Q. Did you notice him after that?" to which you replied ——

(Objection by Att'ys for Def't.)
Mr. Procter: "I won't insist upon that."

Q. Now do you tell Mr. Rodes, and do you mean to tell this jury that you see that emergency application applied daily on the trains?
A. No sir, not daily, but I said frequently.
Q. Do you mean that it is frequently applied by the men in the ordinary business of the road?
A. No sir I didn't say ordinary business, I said frequently in case of trouble.
Q. You mean that it is applied somewhere on the road, but on no particular train?
A. No sir, no particular train, but some train might use it.
Q. It is of daily occurrence on some road in the United States?
A. No sir it would not apply to other roads.
Q. On the L. & N. road?
316 A. That is what I mean. It might be applied in any case where it was necessary.
Q. How many times have you ever applied it from the rear of the coach?
A. I don't remember.
Q. Do you remember to have ever applied it more than two times in your life?
A. I don't remember how many times.
Q. When was the last time that you applied it?
A. I can't give you the date but I can give you the place.
Q. As a flagman?
A. Yes sir, just South of Springville.
Q. What was the necessity?
A. Car broke down.

(Objection sustained.)

Q. Now Mr. Rodes asked you about the danger there, now what was the danger if any in applying the brakes on that occasion?

(Objection sustained.)

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. There are other jerks and jars to considerable extent on freight trains in their ordinary operation other than that arising
317 from the application of emergency?

(Objection sustained.)

Testimony of T. A. Sorrells.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. State your age?
A. Thirty-three.
Q. Where do you live?
A. Bowling Green.
Q. What is your occupation?
A. Fireman.
Q. Did you know W. H. Stewart?
A. Yes sir.
Q. How long did you know him prior to his death?
A. Two years.
Q. Were you at Cumberland City in the State of Tennessee September 5th 1908?
A. Yes sir.
Q. What position did you occupy at the time?
A. Fireman.
Q. Did you stop at Cumberland City on the North bound trip for any purpose?
A. Headed in there for the passenger train.
Q. What number of passenger train?
318 A. 103.
Q. If Stewart received any injury there in any way, tell in your own way what occurred?
A. He said he got hurt.
Q. Tell in your own way what occurred, how he got hurt, if at all?
A. We headed in there for 103 and there was some cars on the side track and we coupled to them and we shoved on in and was out of the clear, and the conductor gave the back up signal and the head brakeman went out to flag 103 and he was getting the back up signal and he was angle cocked and he said it threw him up against the cab.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. How long after, you saw the conductor give him the signal to back and he was backing?

A. Yes sir.
Q. And the emergency was applied?
A. Yes sir.
Q. What effect did it have on Stewart and on the train?

(Objection by Att'ys for Def't.)

The Court: "What did you see?"
A. I didn't see him at all.
319 Q. What effect did it have on the train?
A. Just stopped the train.
Q. What did you do?
A. I didn't do anything.
Q. What were you doing at the time?
A. Ringing the bell.
Q. Was that your duty?
A. Yes sir.
Q. What was Stewart doing the last time you saw him?
A. Standing up against the cab.
Q. Was he moving his engine or doing anything?
A. Not doing anything the last time I saw him, I was on the other side of the engine until after we stopped.
Q. What happened to you when this train was put in emergency there?
A. I was standing on the deck and I got overbalanced and caught against the tank.
Q. What caused you to get overbalanced?
A. The sudden stop of the train.
Q. What was it you caught against?
A. The tank.
Q. What did you do then?
A. Didn't do anything.
Q. What did Stewart do?
A. I don't know what he did, I didn't see him. I went over on the other side afterwards.
Q. How long?
320 A. About 10 or 15 seconds.
Q. Did you have any conversation with Stewart about any emergency stop?
A. Yes sir, I asked him what was the matter and he said the brakeman angle cocked him and stopped the train.
Q. What else did he say?
A. Not anything.
Q. Is that all you remember about it now?
A. That is all.
Q. What part of it did he say that hurt him, how did he say it hurt him?
A. Said it threw him up against the cab.
Q. What part of him did he say was hurt?
A. Said he hit his head against the cab.
Q. Did he say anything about his shoulder?

A. I don't remember whether he said anything about his shoulder or not.

Q. After that did you see him talking with Conductor Jones?

A. Yes sir I saw him talking to him.

Q. How long afterwards?

A. Just a few minutes.

Q. To refresh your recollection didn't he say when you went around there "I asked him what was the brakeman trying to do" and what did he reply to that?

(Objection sustained.)

321 Q. Didn't you ask him this "What is the brakeman trying to do?" to which he replied "Kill somebody I reckon."

(Objection sustained.)

A. Yes, I went around there and asked him what was the matter and what was the brakeman trying to do, and he said he was trying to kill somebody he supposed.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. What was the effect of that emergency application on your train?

A. Running slow, the sudden stop as slow as we were going——

Q. Was it a hard jar?

(Objection sustained.)

Q. How far had your train moved at the time this emergency was put on?

A. I don't know exactly how far.

Q. You were on the other side?

A. Yes sir on the other side of the engine.

Q. Did you see the conductor give Stewart the signal to back?

A. Yes sir.

Q. In obedience to that what signal did Stewart give?

322 A. I told you the back up signal, 3 short blasts of the whistle.

Q. And then you were ringing the bell?

A. Yes sir when the conductor gave the signal I went over on my side of the engine where I belonged.

Q. How many cars in front of the engine?

A. I don't know, six or eight, may be more.

Q. About how many behind you?

A. I guess between 25 and 35 cars.

Q. Do you know what time you got in there?

A. About 9:25 I reckon and laid there for 103.

Q. What time did 103 get in?

A. I don't know what time, they were on time I think.

Q. What was the time of 103 at that time?

A. About 9:30, I don't know exactly what.

Q. Was there a freight train standing on the main when you got there or not?

A. I don't recollect.

Q. What was the condition of Stewart immediately before the injury?

A. He was in bad health.

Q. What was the matter with him?

A. I don't know what was the matter with him, I am no doctor.

Q. Wasn't you asked about the condition of his health when you gave your deposition in this case?

A. No sir I think not.

Q. What was his appearance immediately after this emergency application, could you tell whether or not he was suffering
323 immediately after this application of air?

A. He mentioned it to me once between Cumberland City and Guthrie, what he said to the brakeman about it.

Q. Didn't you give your deposition before in this case at my office December 27th, 1910, and in which this question was asked you: (Q. Had you seen him immediately before this injury at Cumberland City, and if so, what was his condition?" A. He seemed to me as well as he always was.") Was that question asked and did you make that answer?

A. Yes sir, always was, I never had seen him well.

Q. Did you say anything in this deposition that you had never seen him otherwise but well?

(Objection sustained.)

Q. You don't know the speed of that train when this emergency was applied?

A. No sir.

Q. Do you know the condition of the train when this emergency was applied?

A. The condition of the train, no sir.

Q. Do you know where Hill was?

A. No sir, didn't see Hill.

Q. The only signals you saw were the signals given by the conductor?

A. Yes sir.

Q. I am requested to ask you, if you at the time that emergency was applied, or the train ordered to back by the conductor,
324 was that train on the side track or main track?

A. On the side track.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Are you a married man?

A. Yes sir.

Q. I believe you said you lived in Bowling Green now?

A. Yes sir.

Q. You stated that Mr. Stewart had been in bad health, I will ask you if you ever saw him taking medicine prior to this occasion at Cumberland City?

A. Yes sir.

Q. Were you his fireman?
A. Yes sir.
Q. Made trips with him?
A. Yes sir.
Q. Fireman in the same cab with the engineer?
A. Yes sir.
Q. Did you ever hear him prior to that time complaining of feeling bad?
A. Several times.
Q. What kind of an appearance did he have with reference to physical health, did he look like a stout healthy man or a delicate man?
A. He was a delicate man.
Q. In appearance?
325 A. Yes sir.
Q. On September 5th, 1908, the day of this occurrence at Cumberland City you were his fireman, were you before that?
A. Yes sir a few trips.
Q. Did you come on to Bowling Green with him on that trip?
A. Yes sir and made other trips?
Q. As fireman on the same engine?
A. Yes sir.
Q. After that trip did you ever hear him make any complaint about that Cumberland City matter, or mention it?
A. He never mentioned it to me at all after the day he was hurt.
Q. Do you know his signature "W. H. Stewart?"
A. Yes sir.
Q. Does the engineer and the fireman, or did the engineer and the fireman have to sign what is known in railroad parlance as a trip card?
A. The engineer signs that.
Q. Sometimes the firemen sign them?
A. Sometimes the fireman makes them out for the engineer.
Q. Isn't it true that sometimes the engineer signs for the fireman?
A. Yes sir sometimes signs his name when he makes out the card.
Q. And they show the date and the number of the card?
A. Yes sir.
Q. I show you here a number of cards and ask you to look
326 at all of them and say whether or not they are not made out and signed by W. H. Stewart, look through them and see if they are the same ones?
A. Yes sir this is his signature to each of them.
Q. Now take this one here, what trip does that show and what is the number and the date of the trip?
A. 5th of September, 1908.
Q. From what place to what place?
A. From Paris to Bowling Green.
Q. That was the trip when you passed through Cumberland City?

A. The trip he got hurt.
Q. The next, what date does that show?
A. The 9th of September, 1908 from Bowling Green to Paris.
Q. And returned?
A. No sir.
Q. Where from?
A. From Bowling Green to Paris.
Q. Is that the whole trip?
A. Yes sir that is a trip.
Q. Take the next one, the date and trip?
A. 10th of Sept. 1908, from Paris to Guthrie and return to Paris.
Q. Take the next card and see the date and trip, see what date and trip that was?
A. The 14th of September 1908 from Paris to Guthrie and return.

327 Q. Now the next trip he made according to the card?
A. 16th of September, 1908, from Paris to Bowling Green.
Q. Next trip and date of it?
A. September 18th, 1908, from Paris to Bowling Green.
Q. Next card, show the date and the trip it represents?
A. From Bowling Green to Guthrie 2nd of September.
Q. That was before the 5th then?
A. Yes sir.
Q. I will ask you if as shown by these cards you were his fireman in all of those trips except one after he got hurt after the 5th of September, 1908, or perhaps two, I don't recollect?
A. I was his fireman on all except two trips.
Q. And I believe as you said that during none of those trips did you hear him complain of what happened at Cumberland City?
A. No sir, he never said anything to me at all.
Q. Shortly before Sept. 5th, 1908, were you and Stewart in any wreck or derailment?
A. Yes sir, once.
Q. Where?
A. At McKinnon.
Q. When was that?
A. August 22nd, 1908.
Q. Were you and Stewart both on the engine?
A. Yes sir.

328 Q. What happened to the engine, and if he got any jar, what kind of a jar did he receive?
A. We run over a derailer and got the engine and front trucks on the ground and ties.
Q. Before getting off the track did it bump on the ends of the ties?
A. Yes sir.
Q. Did the engine turn over?
A. No sir, the engine never turned over.
Q. State whether or not as a railroad man under these circumstances, the engineer received any severe jerks or jars?

A. He would get pretty good jars running over ties with the engine.

Q. How about when it was derailed or thrown off the track?

A. Oh, it was a pretty heavy jar when we run over that derailer and hit on the ties.

Q. When you come into Cumberland City on September 5th do you recollect whether there was a train already standing there?

A. I don't remember.

Q. You do know that you were expecting passenger train 103?

A. Yes sir.

Q. And that Minor went out front to protect against that train?

A. Yes sir.

Q. Did you see the conductor give the signal to back the train?

329 A. Yes sir.

Q. Which side were you on?

A. On the engineer's side standing in the deck.

Q. Then where did you go?

A. On the fireman's side and commenced ringing the bell.

Q. Could you see the engineer then?

A. No sir.

Q. What happened then when the train was stopped by the air-brake on the engineer's side, you don't know?

A. No sir, couldn't see.

Q. What was between you and him?

A. The boiler.

Q. In the operation of all freight trains are there any jerks and jars necessarily incident to the operation of freight trains?

A. Frequently we have jars in running through dips and the slack will run back.

Q. In your judgment to give a measure of it, in a train of about 30 cars, about how much slack would there be?

A. Something near a car length.

Q. In the taking up of slack in the stopping of trains are there any jerks or jars?

A. Possibly there would be.

Q. Would the cars bump together?

A. Yes sir.

Q. In going down dips, what kind of jars?

A. The rear end will run up and hit the front end of the
330 train and when you go out of the dip the slack will run out and cause a jerk.

Q. In the operation of a train by the engineer, the engineer can make what is called a service application of the air-brake can he not?

A. Yes sir.

Q. State whether or not there sometimes occurs what is called a quick action triple in making service applications?

A. They will go into emergency sometimes, it is frequently the case.

Q. I will get you to state whether or not a jerk or jar of the

train as it occurred there at Cumberland City was such as was usual and incidental and customary in the ordinary operation of freight trains?

A. Well, sometimes we have jerks.

Q. Can you operate a freight train at all without jerks?

A. Sometimes you can, lots of times.

Q. On every trip you make?

A. I would not say every trip, we have jars occasionally. I don't know what about the other part, but the engine is not jerking.

Q. How about going down dips?

A. The slack runs out of the rear end, there is not a very heavy jar.

Q. In this instance was this jar hard or soft?

A. Well, it was about a medium jar I suppose.

Q. A medium jar such as is usual and customary, and met
331 with in the operation of freight trains on that Division?

(Objection by Att'ys for Pl'ff. Objection sustained.)

The Court: "Ask what he means by a medium jar."

Q. Do you mean such as is usually met with in operating freight trains?

A. Yes sir, I have had several jars of the same kind in operating freight trains.

Q. There has been read to the jury a portion of the book of air-brake and whistle signal rules as follows: "The emergency or quick action must never be used unless it is to avoid injury to life or property. No excuse will be taken, the necessity for its use can be avoided by returning the handle to the lap — the engine reaches the exact speed desired." I will call your attention to that portion which speaks of "returning the handle to the lap" immediately after the first application, and ask you to whom that refers?

A. The engineer.

Q. Can it have any application to the conductor in the caboose or flagman at the caboose?

A. No, they haven't got anything to do with that part of it.

Q. Can you use that with the angle cock, is there any
332 handle to be returned to the lap in the operation of the angle cock?

A. No sir.

Q. That applies to the engineer in the performance of his duty?

A. Yes sir.

Q. As to the speed that train was going when it was backing in that siding, I will ask you whether or not it was fast or slow?

A. It was slow.

Q. Do you know the position Stewart was in at the time the train was stopped?

A. No sir, couldn't see the position.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Rodes asked you about these special signal rules, are you familiar with this: "Emergency must never be used except to avoid

injury to life or property," that applies to its use by anybody does it not?

(Objection by Att'ys for Def't. Obj. overruled; to which ruling the Att'ys for Def't except.)

Mr. Rodes: "He didn't read it all."

333 The Court: "He can ask him if he knows what this applies to."

Q. Answer the question?

A. I answered the question, I said the train crews use it, other people are not allowed to use it. If they see it is liable to damage property or kill anybody, but nobody else ain't got no right to be using it.

Q. Mr. Rodes asked you if it was not usual and an ordinary occurrence to have jerks and jars in a train, and you stated that you had seen those jerks and felt those emergency jerks a few times. The emergency jerks are only used in case of injury to life or property, and while they are recognized as dangerous they are only used to avoid greater injury than the injury to the men on the train?

A. Ask the question again.

Q. I say the emergency stop is recognized as a dangerous stop. Isn't it recognized as a dangerous stop?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. They use that to keep from killing people and destroying property.

Q. And they are the circumstances under which it is justifiable to use it?

A. That is what it is used for.

334 (Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. You say it is used to prevent destruction to property or life either one?

A. Yes sir.

Q. And that emergency can be applied either by the engineer or by the flagman in the rear?

A. Yes sir.

Q. There are plenty of stops of the freight train made without using the emergency, that jerk and jar those on the train?

(Objection by Att'y for Pl'ff. Obj. overruled, to which Att'y for Pl'ff excepts.)

A. Repeat the question.

Q. Are there not many stops of the freight train that jerk and jar the train crew when there is no emergency application of the air-brakes?

A. Yes sir.

Q. And such jerks are equivalent to such jerks and jars as you experienced at Cumberland City?

(Objection sustained.)

Att'y for Def't makes the following avowal: "The witness
335 will answer that he frequently experiences in the operation of freight trains just such jerks and jars as was experienced at Cumberland City when there was no emergency application whatever and such jerks and jars are usual and customary in the ordinary operation of said trains."

Testimony of O. L. Hill.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Were you flagman on the train on which W. H. Stewart was engineer? On Sept. 5th 1908 running from Paris North to Bowling Green?

A. I don't remember the date but I think I was the flagman on the train you speak of.

Q. Were you on the rear end of the train?

A. Yes sir.

Q. The flagman's duties are at the rear end?

A. Yes sir.

Q. Do you remember what was done at Cumberland City on that occasion?

A. I remember we headed in the side track to let 115 by and 103.

Q. What time did you reach the place?

A. I suppose it must have been nine o'clock I guess in the morning.

Q. Do you remember the time of 103 at that time?

336 A. It was due there at 9:22 or 9:23, I won't be certain.

Q. Tell the jury the first thing you did when you reached the station?

A. We were headed in the side track and after we headed in I closed the switch behind my train.

Q. Who opened the switch?

A. The head brakeman.

Q. Minor opened the switch, he was the head man?

A. Yes sir.

Q. You as flagman came in and closed the switch?

A. Yes sir after the train entered the side track.

Q. When he got there the switch was set for the main and he threw that and let his train in on the side track?

A. Yes sir.

Q. Then left it on the side track?

A. Yes sir.

Q. And after your train, the caboose, cleared the main track at the South end you closed the switch back for a moment?

A. Yes sir.

Q. That permitted 115 to pass out?

A. Yes sir.

Q. Then when 115 passed out you left it still set for the main?

A. Yes sir.

Q. Did you test that with the lock and key to see if it was securely fastened?

337 A. Always do that, yes sir.

Q. What else occurred?

A. After we were in the clear and 115 passed they began backing up, and I stopped them.

Q. How did you stop it?

A. By the angle cock on the rear end.

Q. There was a conductor's valve in the caboose wasn't there?

A. In the caboose there was, yes sir.

Q. But you used the angle cock in the rear?

A. Yes sir it is on the rear end of the caboose.

Q. The conductor's valve was on the inside of the caboose?

A. Yes sir.

Q. Tell the jury if that train was about to run over anybody at that time?

A. If it was I didn't see it.

Q. For what purpose did you apply that angle cock?

A. So I could get to the switch in case he wanted to back out and throw the switch before he ran through it. I wanted to stop him before he ran through the switch.

Q. You didn't know whether he wanted to back out or not?

A. I presumed he did by him backing up.

Q. You didn't know how far he was going to back, he was answering the signals from the conductor wasn't he?

A. I don't know who he was answering signals from.

Q. It is against the Rules to move without signals from somebody?

A. Yes sir.

Q. Where were you when he began to back?

338 A. Somewhere between the crossing at the South end of the side track and the middle crossing.

Q. How far from the switch stand?

A. I don't know, I was between the two crossings.

Q. How many feet?

A. That would be hard to say the number of feet, for I don't know.

Q. How many, you know something about it. Don't you pass by that station every day?

A. Very near; I never had occasion to measure it and I never had occasion to hear anybody say they had measured it but I was about half way between the two crossings.

Q. Was it as much as 100 ft. or 200 ft. from the station?

A. It might have been 100 ft. or 200 ft., I won't be certain.

Q. How far was the caboose from the switch staff when it stopped?

A. It was about half way over the crossing, I don't know how many feet.

Q. How far is that crossing from the switch staff?

A. I couldn't say in feet, how many.

Q. When that train started backing, how far did it back before you applied the emergency?

A. Possibly a car length or a car and a half.

Q. Was the caboose North or South of you at the time it started backing?

A. Bound to have been South of me.

Q. Why?

A. I was at the North crossing.

339 Q. How far were you from the end of the caboose?

A. Possibly three car lengths.

Q. When it started backing what did you do?

A. I gave them the stop signal.

Q. Then what else did you do?

A. Continued giving stop signals.

Q. How many stop signals did you give?

A. I don't know, until I saw he was not going to stop.

Q. Then what did you do?

A. I went and stopped him myself.

Q. You didn't know for what purpose he was moving, you say?

A. No sir.

Q. What speed was he going when you put the train in emergency?

A. That would be hard to say.

Q. Was he going exceeding a mile and a half an hour?

A. Something like that, not over that I shouldn't think.

Q. Was that switch set for the main then?

A. Yes sir.

Q. And what was your object you say in stopping that train?

A. To prevent him running through the switch.

Q. What else?

A. That is what I say, and to keep in the clear for 103 was due at that time.

Q. That was coming from the North wasn't it?

A. Yes sir.

Q. You knew the North main was foul didn't you?

A. No sir.

340 Q. How many cars did you have?

A. Can't say, Mr. Jones' train book shows.

Q. How many cars were on the siding when you got there?

A. I didn't know, I found out afterwards.

Q. You didn't know anything about the condition of the train at all?

A. Not at the head end, no sir, my duties are at the rear end.

Q. You gave your deposition in this case, didn't you?

A. Yes sir.

Q. Didn't you say to Mr. Minor, and isn't it true that you applied that emergency there to bunch the slack?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. You were asked in that deposition Mr. Hill "Do they ever

use the emergency brakes to bunch the slack in the train?" to which you replied "Yes frequently."

(Objection sustained.)

Q. Do they ever use the emergency to bunch the slack in a train?
A. Yes sir.
Q. Is that often done or otherwise?
A. Very frequently done.
Q. How much slack is there in a train of 30 or 35 cars?
341 A. It will average from a foot to a foot and six or eight inches.
Q. For what purpose is it used?
A. To bunch the slack, we get to the track with 39 cars maybe and engine and caboose, and we bunch the slack and get in the clear, applying air from the rear end and get in the clear, it is very frequently done.
Q. Now were you trying to bunch the slack on this occasion?
A. Yes sir, principally that.
Q. And for what other purpose, if any?
A. To prevent him from slacking out further than he did.
Q. In other words you just wanted to stop him?
A. Yes sir to keep him from backing out before I could get to the switch.
Q. Why is it that you are forbidden to apply that emergency stop except to protect life or property?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Isn't it dangerous to life and to property to apply that emergency stop?
A. I don't know that it is dangerous to life, it is dangerous to property sometimes, it very frequently pulls out drawheads.
Q. Isn't it liable to hurt the men on the train when you apply that emergency?

342 (Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to state "Yes sir."

Q. I want to ask you this further question to refresh your recolection, if you were not asked on the former trial of this case: "Q. Then why is it that you are forbidden to apply that emergency stop except to protect life or property"?

(Objection sustained.)
Att'y for Pl'ff makes the following avowal: We expect the witness to reply as set out on Page 96.

Q. Mr. Hill I am requested to ask you if you didn't know at the time you applied that emergency, that the North end of your train still fouled the main?
A. No sir I did not know it.

(Cross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. How old are you?
A. Thirty-eight.
Q. What is your position with the Railroad Company?
A. Conductor.
Q. How long have you been a conductor?
A. I can't be positive.
Q. What were you before you became a conductor?
343 A. Flagman.
Q. You were flagman in 1908?
A. Yes sir.
Q. Prior to Sept. 5th 1908 did you run any with Mr. Stewart or make any trips with him as part of his train crew?
A. Yes sir, frequently.
Q. What kind of a man was he with reference to physical health, do you know whether he complained any?
A. At that time he had been complaining a right smart, he was complaining the day in question.
Q. Do you know whether he had been taking any medicine?
A. Yes sir he sent our head brakeman that day to get medicine at Big Sandy and he didn't get it there and got it at Erin.
Q. Prior to that time did you hear him complain of being unwell?
A. I hadn't been with him for several months and can't say.
Q. What was his physical appearance with reference to physical vigor?
A. Well you might say he was not a robust man, he was a man something like my build or somewhat lighter, about the same appearance I have got, delicate looking, is about all I can say.
Q. You say you had not run with him for several months?
A. No sir I had not, the reason why, I had been on the Paris
344 and Central City coal runs, the same Division, but different runs.
Q. When you pulled into Cumberland City, was there a train then on the track, standing there?
A. Yes sir, on the main.
Q. What did you do when you got there?
A. Threw the switch for the main line.
Q. And went into the side track?
A. Yes sir.
Q. Then the train that was standing there, what became of that?
A. That left ahead of 103.
Q. Before they pulled out you say the switch was thrown for the main, and you were on the siding?
A. Yes sir.
Q. Your position was at the rear end?
A. Yes sir.
Q. Was there a caboose on the train?
A. Yes sir.

Q. I believe those air brakes by means of which your train was operated, could be applied both at the engine and in the caboose, or at the rear of the caboose?

A. Yes sir they are capable of being applied at the rear end by opening the angle cock.

Q. After this train had pulled South, what became of you?

345 A. I started from the switch and started up to the second crossing.

Q. What for?

A. To open this crossing to allow traffic to cross.

Q. Was that your duty under the Rules of the Company?

A. Yes sir under the Rules of the Company by Special Instructions.

Q. Was it your duty to open that crossing?

A. Yes sir.

Q. And you say you started there for that purpose?

A. Yes sir.

Q. As you were going there was any movement of the train made?

A. I suppose I had got half way between the two crossings and they began backing up.

Q. Which side of the train were you on as you went North?

A. Right hand side walking up the middle of the main at the time?

Q. What became of you then as he started back?

A. I looked ahead and looked back trying to figure out what they were doing and I gave them stop signals.

Q. How far was the caboose from that switch at that time?

A. I would not be positive in feet.

Q. How about its relation to the first crossing?

A. They were about a half car length North of that crossing when they started backing up.

346 Q. And towards the switch?

A. Yes sir.

Q. About where did that caboose get out of the clear, or was it out of the clear? Where did it have to be to be in the clear?

A. It had to be just North of this crossing to be in the clear, the caboose if it blocks the South crossing at Cumberland City it is out of the clear, and that is the first crossing after you enter the switch along about that livery stable.

Q. And as it went back the caboose got out of the clear then?

A. Yes sir.

Q. That crossing is about how far from that switch?

A. Well, I would have to kinder estimate that.

Q. If you are not certain, give your judgment?

A. I am not certain in feet, possibly somewhere about 100 feet or round about it.

Q. Now you say you gave the signal?

A. Yes sir the stop signal.

Q. Did you give it more than once?

A. Yes sir two or three times.

Q. Which way were you going?
A. Running towards the rear end.
Q. Where were you placed with reference to the main track?
A. Running on the main.
347 Q. Was your stop signal obeyed?
A. No sir.
Q. When you saw it was not obeyed, what did you do?
A. I used the angle cock to stop him.
Q. If that caboose had continued further and run out further what would have happened?
A. Run out and split the switch, derailed a car, and possibly damaged the caboose and two or three cars.
Q. State whether or not it was your duty to stop the train?
A. Yes sir to save myself from suspension and also the Company from loss on it.
Q. Why did you not continue to go on and throw the switch or line it up, so that the train would run out on the main?
A. Well, very frequently you catch one of those locks that will take two or three minutes to get the key to enter them and have trouble in throwing them, and it is dangerous to try it.
Q. Did you have time to do that with safety to the Company's property?
A. I did not.
Q. Acting on that judgment you used the angle cock and stopped the train?
A. I did.
Q. Under the Rules of the Company is it your duty to apply the angle cock in emergency to protect the Company's property?
348 A. Yes sir.
Q. I refer you to the book Mr. Procter has introduced: "Special Rules for air-brakes and whistle signals" it says "The train line valve must always be applied on freight trains, but neither this or conductor's valve must be used except in cases of emergency. If conductor's valve can not be reached, open cock in the rear". Was that Rule prevailing at that time?
A. Yes sir.
Q. What did you do?
A. Opened the angle cock wide open.
Q. Was that the proper way?
A. Yes sir.
Q. Under the Rules of the Company, when is it proper to use the emergency brake?
A. Only in cases of emergency to prevent danger and accidents and such as that, splitting switches, danger to life or limb or anything.
Q. Or property?
A. Or property or anything.
Q. State whether or not it was your judgment when you found that the engineer didn't obey your stop signals and at or about the time you applied the angle cock that that caboose was going to run out upon that switch and split the switch?

A. To the best of my knowledge at that time that is what I thought.

349 Q. And you acted upon your judgment at that time?

A. Yes sir.

Q. Did the stopping of that train cause any jerk or jar?

A. It didn't in the rear end.

Q. Is or not some jerking or jarring incident to every stop?

A. Oh, yes, any freight train stop, you can't prevent that.

Q. State whether or not such jerking or jarring as must have happened on that occasion was the usual and customary jerking and jarring ordinarily met with in the operation of freight trains?

A. Every day of the world.

Q. Under the Rules of the Company is there any other method of applying that angle cock except to pull it open and keep it open?

A. No sir they never do it any other way.

Q. And that is the way you applied it?

A. Yes sir.

Q. Do you know how long that siding was, do you know what its capacity was?

A. 41 cars I think, and that would be based on 40 ft. length, would be 1640 ft.

Q. Is that your judgment?

A. Yes sir that is the length of it now, and it is the same length as it was then.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

350 Q. Now you say that the emergency as it was applied that day, is applied for the purpose of stopping cars every day?

A. Yes sir, I don't guess there is hardly a day that goes by that some one don't use ti that way.

Q. On some road?

A. Yes sir, on some road, possibly it is used every day.

Q. You didn't mean to tell Mr. Rodes or the jury that it is used on any particular train every day?

A. No.

Q. Or that any other crew uses it every day?

A. No sir, I would not attempt to say that.

Q. And you don't know how many times it is used in the world on any other train?

A. No sir that would be a random guess.

Q. Now Mr. Rodes asked you if it was not the proper thing to do, to apply that emergency to stop that train from going through that switch, is that right?

A. Yes sir.

Q. Isn't it true that you are a very nervous man and you applied the emergency on that occasion when it was not necessary?

A. No sir.

Q. Isn't it true that you are addicted to the use of cigarettes?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

351 Q. Isn't it true that you were under the influence of cigarettes and that you are addicted to the use of cigarettes then and now?

A. No sir I was not.

Q. Isn't it true that you were using cigarettes at that time?

A. No sir, didn't use them at that time.

Q. When did you take it up?

A. In the last two or three months.

Q. Isn't it true that you had your fingers colored with the nicotine of the cigarettes when you testified before?

A. I smoke a pipe nearly all the time, and it is only occasionally that I pick up a cigarette.

Q. Is that true that your fingers were stained from nicotine from a pipe at that time?

(Objection sustained.)

Q. You had just sawed by 115?

A. We let 115 out, they were standing on the main when we got there.

Q. You had to saw by 103 afterwards?

A. I don't say whether we sawed by with them or not, I don't remember that.

(Recross-examination by John B. Rodes, Att'y for Def't:)

Q. I am requested to ask you if at the time you applied the air at the caboose, whether or not the caboose at that time

352 was out of the clear or had fouled the main?

A. I was about the middle of the road crossing, and as well as I remember one corner of the caboose was positively out of the clear fouling the main.

(Redirect-examination by B. F. Procter, Att'y for Pl'ff:)

Q. Do you mean to say that when it stopped it had fouled the South main?

A. Yes sir.

Testimony of T. R. Neill.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green.

Q. How long have you lived here?

A. I have been here about thirty-eight years or thirty-seven.

Q. Well, how long did you railroad?

A. Well, about 28 years all together.

Q. How long did you act as conductor?

A. About fourteen years.

Q. How long did you act as brakeman?
A. Well I was conductor I guess 22 years.
Q. How long since you quit railroading?
A. It has been nine years I reckon.
353 Q. That would have been up to 1905?
A. Yes.
Q. What is your business now?
A. Coal Business.
Q. What track did you run over?
A. Over the Memphis line.
Q. Are you familiar with the track at Cumberland City?
A. Yes sir I was at the time.
Q. Are you familiar with the Rules of operating trains by air-brake and by emergency air and things of that kind?
A. Yes sir I reckon I knew how to use it then.
Q. You have seen it done enough haven't you?
A. Yes sir.
Q. Say on September 5th 1908 a train was proceeding North and it became necessary to take the siding at Cumberland City and the parties operating a freight train was required to take that siding to let out another freight train there and to let out a South bound passenger train and the freight train taking the siding found other cars on the siding and the cars on the freight train and the other cars on the siding were longer than the siding and it became necessary to saw by this freight train that stood upon the siding and to saw by also for the passenger train. Now what
354 would have been the proper movements upon the part of that freight train taking the siding?

(Objection by Att'ys for Def't. Obj. overruled; to which Atty's for Def't except.)

A. Well they would not have had anything to have done but to pull that train in as far as they could and stop and let the other train pull down and go on out of the switch if there was room enough.
Q. Say that the train that took the siding was so long that they could not occupy the siding?
355 A. They could pull in to the siding and let the passenger train come on to the main, and then when it went on to the main, they could go on out.
Q. Say 115 occupied the space between the points of the switch siding, would it be necessary for this freight train to foul the North end of the main?
A. No sir, they would not have done that if they could not have passed, if they fouled both ends the North bound train was pulling into the side track.
Q. They first got out 115, then would it not have been necessary, if this side track would not hold the freight and the cars that was in the siding when it got there, would not it have been necessary for the North end of this cut of cars to put in behind this train so as to let this train out at the South end?

(Objection sustained.)
The Court: "Ask him what would have been proper."

Q. We want to let 115 that was standing there when the North bound freight came in by, and the North bound freight was too long for the siding, wouldn't it have been necessary to have pulled the North end of the North bound train down the South end of 115?

A. What we would call that when I was railroading was cut and saw which was to pull that train in as far as we could get. Pull the train that was on the main track to clear the switch, and leave that other one North of the switch, and then the other one would pull its hind end in the clear so that we could go on and
356 then this man came back and he cleared and went on and then the man going south would go on. There was no use cutting the passenger train for it would have cleared.

Q. Wouldn't it have been easier to back that train into the rear if the main track between the two points of the siding would clear the freight train, couldn't you have just sawed by?

A. Oh, yes.

(Objection sustained.)

Q. Taking it that the South bound main was shorter than the siding?

A. You mean the clearance between the switches, yes sir.

Q. What would have been the proper thing to do?

A. They couldn't have done anything else than to cut off to clear to get by them, if I understand what you said that that passenger train would not clear.

Q. The passenger train would clear though?

A. Why just pull in and saw by.

Q. But the siding would not clear the North bound freight?

A. If the freight train was there, just pull on in and let the freight train go by.

Q. After 115 passed by and went South, they had been compelled to foul the North end of the main and started backing in order to let 103 by, and the switch at the South end of the siding was
357 set for the main track instead of the siding, what would have been the duty of that rear brakeman or flagman?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It would have been his duty to have thrown the switch for the siding.

Q. When those three signals were given, the blasts of the whistle, what does that indicate to every person about that train?

A. It indicated that he was going to back up.

Q. Then you say it was the duty of this flagman to have gone down there and opened up the siding?

A. Yes sir.

Q. What was his duty then when that train had backed through that siding, what should he have done?

A. When the train backed up he should have gone to the rear end of the train and gotten on the rear end and went on back with it.

(Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. You haven't railroaded any for a number of years?
A. It has been about nine years I guess.
Q. You were not railroading any in 1908?
A. No.
358 Q. Nor four years before that?
A. No sir.

Testimony of Capt. George James.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Ky.
Q. How long have you lived here?
A. About thirty years.
Q. How long did you railroad?
A. About 25 or thirty years.
Q. When did you do your last railroading?
A. I think it was in 1905.
Q. Where was your last railroading done?
A. On the main line, First Division, between here and Louisville.
Q. Are you familiar with the rules and regulations for switchmen in the operation of the air on freight and passenger trains, if so, were they the same at the time you were on the train as they were in Sept. 1908?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Yes sir I think they are.
Q. In what capacity did you run?
A. I was freight brakeman, passenger brakeman, baggage man, and train conductor.
Q. Did you ever work in the yards?
A. Yes sir.
359 Q. Where?
A. In Nashville.
Q. Did you ever work in the yards here?
A. No sir I never switched in the yards here.
Q. Are you familiar with the yards at Cumberland City?
A. Well it has been about 30 years since I was on the Memphis line.
Q. I will just ask your opinion as a railroad man, say that they have a siding there at Cumberland City. I show you here 3 photographs of the track there at Cumberland City, Track No. 1 or Photograph No. 1, is taken from the South end of the switch looking North.

No. 2, is from the South end looking North from about the middle of the station, and No. 3 is from the North end of the switch looking South. Now I will ask you if a train coming North, a freight train coming North, found it necessary to take the siding at Cumberland City to let by a freight train that was standing in the clearance on the main line between the points of the switch, the North and the South points of the switch, and also to let by a South bound passenger train 103 that was short enough to occupy the clearance between the North and the South points of the switch, and that freight train, the North bound freight had entered the siding from the rear from the South, and found upon the siding a lot of freight cars, other cars, and the cars that were on the North bound freight added to
360 the cars backed up on the siding were longer than the siding, and it was necessary to saw by to let 115 by and also to let 103 by, tell the jury what would be the proper and careful manner or proceeding to accomplish that purpose and to let those trains by?

A. Freight train, North bound, would have pulled up until the South switch through which 103 passed was clear allowing 103 to pass, then they backed down sufficiently for 115 to come in as 103 had already done and push up on the main track North of the North switch, and clear the South switch and let 115 pass through that the same way and pull the box cars back into the siding and place them where they had been, if they need to be placed, and push out of the switch at the South end and close the switch for the main line and proceed on on the main line.

Q. Now say that 115 had passed and the North end of the main line immediately North of the siding was fouled so that it became necessary to back in for 103 to get in the clearance South of the switch point there and this train was standing still with the North end of the main line fouled, what should the conductor and flagman have done at the rear end, what would have been their duty?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. The flagman should have gone to the South switch and have thrown the South switch to permit the rear of that train
361 to have backed through it on the main line and have cleared the North switch so 103 could have come down, on the main, and then pulled up again and cleared the South switch again.

Q. Now would it have been proper or careful under the Rules or customs of the Company for that Conductor in charge of that train to have given that engineer the signal to back that train to clear the North end with the switch at the South end of the siding set for the main line?

(Obpection by Att'ys for Def's. Obj. overruled, to which Att'ys for Def't except.)

A. According to the Rule a train is not to be moved against a switch until the switch has already been thrown.

Q. Whose duty is it to see that it is properly thrown and properly lined up?

A. The man who gives the signal should know before he gives the signal that the switches are in line for the movement of the train.

Q. Now say that the conductor in charge gives the signal to back up under these circumstances what is the duty of the engineer to do?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. To obey the signal.

362 Q. After he gives the signal to back what is the duty of the engineer until he gets another one?

A. He gives the back up signal and obeys it until he gets another signal.

Q. And does that until he gets another?

A. Yes sir, he stops one and proceeds with the other.

Q. Now if the engineer watching the conductor giving signals and the conductor is in charge of the train, and another signal is given, whose duty is it to repeat them to the engineer, if anyone's?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. How is that?

Q. If he is moving in obedience to the conductor's signal, and a brakeman gives another signal, whose duty is that to repeat that signal to the engineer?

A. The conductor's, if the brakeman should give a signal.

Q. Now if a brakeman at another point in the yard gives a signal, whose duty is that to repeat that to the engineer?

A. The conductor's, if he is in a position to repeat it, or another brakeman who is in a position to repeat it.

Q. It is the duty of the engineer to watch the conductor for signals?

A. Yes sir.

Q. And he takes his signals from him?

363 A. Yes sir.

Q. I will ask you, say this train has pulled in for the purpose of letting 115 by and fouled the main track at the South end of the siding or it cleared the main at the South end of the siding and it is necessary to saw by, what was the duty of that flagman, what should he have done, where should he have been if he knew that that siding was not sufficient to hold the cars that were being moved?

(Objection by Att'ys for Def't.)

The above question is withdrawn by Mr. Procter.

Q. Say this train has pulled in on the siding, this North bound freight has pulled in, and they are handling more cars than the siding will accommodate, and they have pulled in the clear so as to let 115 by, the South point of the main and this train is starting back to back out for the purpose of clearing the North main so as to let another train by, what should that flagman do?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. That would necessitate the shifting of the switch at the South end and he should be there to shift the switch.

Q. You say he should be there to shift the switch for the siding?

364 A. Yes sir.

Q. And when the train backed through what should the flagman do?

A. He should swing on to the steps of the rear of the caboose and stand on the rear end as long as it was backing up and as long as it was exposed, if he didn't have to go back to flag according to Rule 99.

Q. Say that he was not at the switch but had left the switch and gone into the yard, and this engineer blew three signals in answer to a back up signal, when he heard those three signals what should he have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He ought to have proceeded at once to the switch, knowing that the train was going to back up.

Q. Say he does not proceed back to the switch but he is so far from the switch that there is a possibility or even a probability that the caboose will go through the switch and split that switch, should he apply the emergency, or should he let that caboose go through the switch and split the switch, in your judgment?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I think that would be a matter of judgment on the part of the flagman.

365 Q. What would be the effect of the caboose or the cars rolling through and splitting that switch?

A. It would not affect the cars or rolling stock at all.

Q. Would there be any danger of derailing the caboose?

A. It would bend the point of the switch rail and possibly straighten out the switch rods or bend the switch points.

Q. If he ran through and split or bent the switch point how long would it take to repair it?

(Objection sustained.)

Q. What would the damage be?

A. It would be small, it could be repaired in a very short time if they had a hammer or a maul with a few licks it could be knocked in shape again.

Q. What is the danger in applying the emergency to freight trains going back at the rate of 1½ miles an hour?

A. Just about like striking a bumping post, because the application when a car is moving at about 1½ miles or two miles every car stops that quick. (Indicates.)

Q. What is the danger in stopping a car like that?

(Objection sustained.)

Q. What is the effect?

A. Just a shock.

Q. What is the danger to persons about the train or to the property on the train in making such applications?

366 (Objection sustained.)

Att'y for Pl'ff makes the following avowal: We expect the witness to state that it would be dangerous to apply it and liable to hurt people on the train and damage property and pull out drawheads and injure property on the train.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. You haven't railroaded for a long time have you?

A. Not since 1905.

Q. And up to that time you had been conductor between Bowling Green and Louisville?

A. Yes.

Q. For quite a while?

A. Possibly fifteen years.

Q. You had not been in Cumberland City for 30 years back?

A. I think it has been longer.

Q. You never did run on the Memphis line?

A. Oh, yes sir, I run baggage and broke on the Memphis line.

Q. How long ago?

A. About thirty years ago.

Q. If the conductor gives a signal on the siding for a train to back, and he begins to back, and receives a signal from a brakeman from the rear end of the train to stop, shouldn't he obey that signal?

A. Yes.

367 Q. It would be his duty to obey it?

A. I don't know that he should after the signal given by the conductor, in that event the conductor should repeat.

Q. And if the conductor is not in a position to see or does not see the signal, then ought not the engineer to obey the signal of the flagman at the rear end of the train?

A. Yes sir.

Q. How long since you run on a freight train, since you broke on a freight train?

A. I was on the Louisville Southern.

Q. I mean for the L. & N.?

A. It has been 25 years I guess, I don't remember.

Q. They had not gotten the air-brakes 25 years ago?

A. I don't believe they had.

Q. They had no air-brakes at all?

A. That is my recollection.

Testimony of J. F. Phelps.

(Direct examination by B. F. Procter, att'y for pl'ff:)

Q. Where do you live?
A. Richmond.
Q. How old are you?
A. Thirty-two.
Q. What is your occupation?
A. Farming now.
Q. Have you ever worked for the L. & N.?
368 A. Yes, sir.
Q. When, and how long?
A. From 1907 to 1909, and from May until August, 1913.
Q. From where were you running?
A. From Bowling Green to Nashville, Second Division.
Q. Have you ever run between here and Memphis?
A. Between here and Paris.
Q. When?
A. I only made three or four trips.
Q. Are you familiar with the siding at Cumberland City?
A. No, sir.
Q. What year?
A. It must have been 1908 or 1909.
Q. Are you familiar with the rules for switching and for air, and for the management of trains in September, 1908?
A. Yes, sir, fairly well.
Q. You have been examined on the use of air and on the rules and signals too, haven't you?
A. Yes, sir.
Q. Have you got a certificate of qualification?

(Objection sustained.)

Q. Say that a train, a north bound freight train with 33 or 34 cars, running from Paris to Bowling Green by Cumberland City, was required to take the siding at Cumberland City to let a freight train by, say 115, and that freight train was standing on
369 the main, and between the switch point, North and South switch point at Cumberland City, and there was an approaching South bound passenger train 103 that it had also to let by there, and this North bound freight train should find some cars upon the siding, and the cars that were in the train brought there to Cumberland City and the cars backed up on the siding were longer than the siding, and it became necessary to saw by, both for the freight train and the passenger train, tell what would be the proper and careful mode of operating that freight train so as to let those trains, freight and passenger, by South?

A. If the freight was on the main line, the North bound train would come on and head in and couple to the cars that was on the track and head through the switch at the North end far enough on the main line to clear the South switch points in order for 115 to

proceed, and then he would back in on the passenger track out through the South switch point and flag 103, if it was due, and let it down between the switch points, on the main line, and then railroad back through the switch, and close the switch in order for 103 to pass.

Q. Say after 115 had passed and gone South and the North end of the main line track was fouled by the cars that the freight train was handling, and it became necessary to back South in order to let 103 come in, and say further that the switch at the South end of the siding was set for the main, and the conductor wanted
370 to back his train on South so as to clear the fouled main, what should he do before giving a signal to back up?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. Well he should know where his men was at, and know what he was expecting to do, and the proper places for these men.

Q. Would it be proper and careful railroading for a conductor under those circumstances to give a signal to back his train when the switch at the South end of the siding was set for the main track?

(Objection as to leading question. Objection sustained.)

Q. Now if the switch at the South end of the siding was set for the main track, and it was necessary to saw by, was it necessary to go through that switch or to have it thrown before he could get out on the South end?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. It would be necessary to have it thrown or run through it, it would be necessary to have it open or run through the switch.

Q. What would be the conductor's duty if that switch was set for the main instead of set for the siding, before giving his signal to back his train, what ought he to do about that switch if anything?

371 (Objection by Att'ys for Def't. Obj. Overruled; to which Att'ys for Def't except.)

A. He should know that his flagman had the switch open before he backed out of the passenger track on the main.

Q. Should he give any signal until he knew that that switch was open?

A. No sir.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

Q. When that train passed into the siding and they had to saw by for 115, where should that flagman on that freight train have been, and what should he have done?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. He should have closed the switch and remained not nearer than 10 ft. of the switch until the train had passed out, and knowing that he had to saw by he should have opened the switch and let 103 go down the main line and should have protected the rear end according to Rule 99.

Q. Do you know the effect of making the emergency application, say if a train of 30 or more cars is backing at the rate of a mile and a half or two miles an hour, and the emergency application is made at the rear of the caboose, what effect would it have upon the cars upon that train?

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A. It would be a very sudden stop or jar, it would be a pretty hard jar or jerk like hitting something solid, it would be quite a jar.

Q. Would there be any danger to men on the train, the engineer and the fireman and men about the train?

(Objection sustained.)

Q. What would be the effect upon the men and train crew?

A. It is likely to jerk out draw-bars or to jerk a person down or jerk him against something or jerk him off the train.

Q. What would be the damage you spoke of letting him run through the switch point, say that switch point was set and he ran through and split the point——

(Objection sustained.)

Q. What would be the effect upon the switch point?

A. It would open up the switch something like the width of the flange from the wheel.

Q. Would there be any danger of hurting anyone seriously in that sort of way?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys Att'ys for Def't except.)

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A. That would be about the only danger to it, and it would cause a few minutes' delay, they would have to spike the switch back to the main line when they got through, and it would take about 10 or 15 minutes.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. When did you commence railroading?

A. May 20th, 1907.

Q. Between what points?

A. Bowling Green and Nashville.

Q. In what capacity?

A. Brakeman and flagman.

Q. How long did you work at that time, May 1907?

A. Well, I worked until about November 26th or 27th 1909.

Q. As a brakeman?

A. Between Bowling Green and Nashville.

Q. And have you been braking any since?

A. I worked from May 1913 until the night of Aug. 8th 1913.

Q. As a brakeman?
A. Yes sir.
Q. And that is all the work you have ever done for any railroad?
A. No sir I worked for the M. K. & T. in Dennison, Texas, two years.
Q. Is that all the work you ever done for the L. & N.?
A. Yes sir.
374 Q. Did you ever run through a switch?
A. Yes sir.
Q. How many?
A. I believe down here in the Bowling Green yards, I was switching in the yards.
Q. You were not braking then?
A. I was not on the road then.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. How many times did you ever apply the emergency in all your railroading?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)
A. Never did.

(Recross-examination by Jas. C. Sims, Att'y for Def't:)

Q. Were you railroad brakeman?
A. I broke ahead and flagged too, I worked extra as flagman and filled out a flagman's form.

375 *Testimony of C. E. Gray.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Rich Pond.
Q. What is your occupation?
A. Fireman.
Q. How old are you?
A. Twenty-six.
Q. Have you ever railroaded any?
A. Yes sir.
Q. How long?
A. About a year.
Q. On what line?
A. Second Division main line.
Q. When did you quit railroading?
A. Last August.
Q. And your railroading then was the year prior to last August?
A. Yes sir.
Q. Are you familiar with the use of signals and air signals and backing and proper signals to be given, and proper applications of air in operating freight trains?
A. Yes sir.

Q. Now Mr. Gray I will get you to state between what points you run?

376 A. From Bowling Green to Nashville.

Q. Say a train approached the station at Cumberland City coming North and it was required of that freight train to take the siding to let by a freight train that already occupied the clearance between the North point of the switch of the siding and the South point, when this other train came up, and it was necessary further to let it remain on that siding until another train passed the South bound passenger train 103, and when this North bound freight arrived at this station it found on this siding several cars, and the cars that it was bringing North taken together with the cars that it found upon the siding were longer than the siding, and it became necessary to saw by so as to let 115 pass, and then to saw by and let the South bound passenger pass, what would be the proper and careful manner of operating that freight train, the North bound freight?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The front brakeman should first throw the switch and let them pull in and the flagman should lock the switch and if they had to saw by remain in about 10 ft. of the switch until the freight train had passed, and go back and throw his switch and let the passenger train down the main.

377 Q. At the South end of the switch?

A. Yes sir.

Q. Would there be anything to indicate to that flagman on that train that it would be necessary to open that South switch after 115 had passed?

(Objection by Att'ys for Def't.)

The Court: "I don't understand."

Q. If it were understood that both the freight train and the passenger train were to pass this North bound freight, what should this flagman do there at that point?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. He should go back when the engineer blew the back up signal, go back and throw the switch, and let it back out on the main to let the passenger train drop on to the main line, if it was fouled at the North end.

Q. Say that this freight train had taken the siding there and had fouled the North end of the switch, that is the main track at the North end so 103 could not pass by without backing the freight train again and the conductor wanted the freight train backed so as to let 103 in, what signals should he give and what should he know about the condition of his track there before giving any signal to back?

378 A. He should know that that switch was open before he gives the back up signal to the engineer, if he was going to drop the passenger train down the main if it was fouled at the North end.

Q. Say, the conductor does not do this, and he gives that signal to back and the engineer is proceeding to back the train in obedience to the conductor's signals, and the switch at the South end of the siding is set for the main track, and this freight train would run through it unless it was changed, and the brakeman that was on there hadn't had time to open the switch and let the train through, should he let it split that switch, or put the train in emergency by angle cocking from the caboose?

The Court: "This witness has had mighty little experience to pass on that question, but I will let him answer."

A. I think it would be as much damage or more damage to put on the air, than to split the switch.

Q. What effect would it have if he split the switch?

A. It only presses it open far enough for the flange of the wheels to go through.

Q. How many times did you ever apply the emergency brake in your life?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. I never did apply it.

379 *Testimony of John Suttle.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Woodburn, Ky.
Q. How old are you?
A. Thirty-six.
Q. Did you ever railroad any?
A. Yes sir.
Q. Between what points?
A. Between Bowling Green and Nashville, and between Louisville and Nashville.
Q. What is your business now?
A. Merchant.
Q. How long since you railroaded?
A. Five years.
Q. You were railroading in 1908?
A. Yes sir.
Q. How long did you railroad you say?
A. Seven years.
Q. In what capacity?
A. Brakeman and Flagman.

Q. Freight or passenger?
A. Freight.
Q. Say that at a station say Cumberland City a North bound freight is required to take the siding to let by a South bound freight, and also a following passenger train, and when this
380 North bound freight takes the siding it finds other cars there and the cars that it has in its train taking in connection with the cars it finds upon the side track, are longer than the siding, too long to occupy the siding, and it becomes necessary to saw by first the freight and then a passenger, and the train is pulled in on the siding and the freight 115 is pulled South and has gone far enough South, and the North end of those cars have fouled the main so that it becomes necessary to back and the flagman or the conductor gives the engineer on the freight a signal to back down so as to clear the North point of the switch so the passenger could get in, and in obedience to that signal to back, the engineer blows three blasts of his whistle which is the signal to back, what is the duty of the flagman upon that freight train upon the siding?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Well he should open the switch and go out to protect the rear of his train for his train to back out.

381 *Testimony of Mrs. Lon Hightower.*

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green, Ky.
Q. Near Mrs. Stewart?
A. Three doors.
Q. How long have you known her?
A. For ten years ever since she married, for 12 years I have known her.
Q. Did you know Will Stewart?
A. Yes sir.
Q. What was the condition of his health before his death?
A. Well, he was a well man, never sick that I knew of, only when he had a spell of grip.
Q. How long was that before he died?
A. In March before he died that coming September.
Q. Aside from that did you ever know of him having any illness?
A. That was the first sickness that I knew of.
Q. Was he a delicate man?
A. He was a slender, tall man, but I never knew him to be sick, and I lived by him for ten years.
Q. Do you know the condition of his family since his death, who constitute his family?

(Objection sustained.)

382 Q. What amount of attention does that youngest child of Mrs. Stewart take now?

A. Why, she takes all of your attention.

(Objection by Att'y for Def't.)

The Court: "I don't think that would have anything to do with the amount of recovery, but the question of distribution, it might enter into that."

Att'y for Pl'ff makes the following avowal: "We expect the witness to state that this child takes all of her time and it is dangerous to leave her alone, and she is an imbecile."

(Cross-examination by Jas. C. Sims, Att'y for Def't:)

Q. You say he had an attack of grip in March 1908?

A. March before he died.

Q. That was in 1908, wasn't it? How long was he affected with the grip?

A. I don't know how long.

Q. Do you know of his being afflicted with appendicitis?

A. They did not fully decide it was appendicitis.

Q. Do you know how long he was sick?

A. No sir I don't know how long.

Q. That was the spring of 1908?

A. Yes.

383 Mr. Procter: "I have the deposition of Miss Reardon, made on the former trial before the jury, and she is out of the jurisdiction of the court, and a resident of the State of Tennessee. And here is the statement of Mrs. Sherrell also."

Rules 117, 69, 86, 119, 44, 104, and 133, and 117 *a* are here offered in evidence by Att'y for Pl'ff, to which Att'ys for Defendant object.

(The Court reserves his ruling for the present.)

(As to Rules, see page 186 of this transcript.)

Testimony of Dr. T. W. Stone.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?

A. Bowling Green, Kentucky.

Q. What is your occupation?

A. Practicing physician and surgeon.

Q. You are a graduate of what school?

A. Vanderbilt Medical College.

Q. Where is that located?

A. Nashville, Tenn.

Q. When did you graduate from Vanderbilt?

A. 1893.

384 Q. Where have you practiced medicine since that time?

A. In Bowling Green except the first three years I was in Barren County.

Q. You have been practicing ever since your graduation?
A. Ever since.
Q. How long have you lived in Bowling Green?
A. Eighteen years.
Q. Did you know W. H. Stewart?
A. I did.
Q. How long had you known him prior to his death?
A. Possibly ten years.
Q. Were you his family physician.
A. I was.
Q. Were you called to see him or did you see him professionally about September 5th 1908, if so, tell the jury what service you gave him or what treatment you gave him and tell what condition you found him in?
A. He came to my office about that time suffering with his shoulder, neck and head and stating that he had received an injury——

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

on his shoulder and head, and on examination I found his neck stiff and also his shoulder, and I prescribed for him and he went away and was gone possibly two, three, or four days, and
385 came back again suffering the same way and possibly a little worse, and I again prescribed for him and he went away, and it seems that he came on the 23d of the month and at that time he was suffering from an *effacia* couldn't say what he wanted to, and pain in his head.

Testimony of Will Hagan.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mr. Hagan, where do you live?
A. Bowling Green.
Q. What business are you engaged in?
A. Ice business.
Q. Got some that is melting now haven't you, Will?
A. About 1,500 lbs. down there.
Q. Where were you born?
A. Right up here where this business university is.
Q. What is your age?
A. Forty-four my next birthday.
Q. What experience have you had as a railroad man?
A. Half of my life.
Q. In what capacity have you served?
A. Switching, braking, flagging, and working on the section.
Q. Are you familiar with the rules for switching and for signalling in the operation of freight and passenger trains, in force Sept. 5th 1908 on the L. & N. R. R.?
386 A. Do you mean in regard to switching with air or switching without air?

Q. Handling air brakes and switching trains and moving trains and operating trains on sidings or main track either, with signals, and the duties of the men?

A. Yes sir, I think I ought to.

Q. When did you quit the service of the railroad?

A. Several years ago.

Q. How many years?

A. Let's see now, it has been seven or eight years, I can't recall now exactly.

Q. What places have you worked?

A. Bowling Green, Bowling Green Yards, and from Bowling Green to Paris Tennessee and from Bowling Green to Nashville, Tennessee, and from Bowling Green to Memphis, Tennessee, and from Evansville to St. Louis in Howell Yards and Evansville Yards and St. Louis and Little Rock, Ark.

Q. Are you familiar with the yards at Cumberland City, Tenn.?

A. Yes sir, it is not called a yard, just a siding.

Q. Are you familiar with that siding?

A. Yes sir I railroaded down there a right smart.

Q. I here show you three photographs marked 1, 2, and 3, and I will get you to state to the jury if those are correct photographs of that yard there and from what position they were taken and
387 how the camera was pointing or setting?

Mr. Sims: Did you make those photographs?

A. No sir I was present when they were made.

(Examination continued by Mr. Proctor:)

Q. Do you know these photographs to be correct?

A. Yes, sir. This is No. 1 here, that is the South end of the switch.

Q. How was the camera set, South of the switch point?

A. Yes sir.

Q. Turn to No. 2, where was the camera set for that?

A. This is what I call the middle picture there by the mill.

Q. Which way was the camera pointed?

A. North, showing North.

Q. Now No. 3?

A. This would show South.

Q. Is the main track straight from the switch point at the South to the switch point at the North?

A. Yes sir you can stand right here where this side track leads off here and see all the way through that track there with the train standing on the main track, you can see the switch until you get right to the switch stand at the North end, the track is straight all the way through there.

Q. Away beyond the passenger depot?

A. Yes sir away apast these cars here.

388 Q. There is a car there, where is that car?

A. Right even right North of the Operator's office and right even with the little freight office or platform.

Q. Does that also embrace the passenger depot?

A. Yes sir, the two story part is the passenger depot.
Q. How far is it from the siding to the passenger depot?
A. Now I can't recall exactly.
Q. About how far?
A. You mean from the siding to the main track?
Q. I mean from the nearest point of the siding opposite the passenger depot to the passenger depot, did you have to cross the siding to get to the passenger depot?
A. From the side track to the passenger depot is something like 6½ ft.
Q. Have you at any time at Cumberland City gone over the ground and made any measurements to ascertain the distance between those two points there?
A. Yes sir some time ago, with you.
Q. Before this former trial here?
A. Yes sir.
Q. How long before?
A. Just a few days.
Q. How far is it from the North end of that siding to the switch point where cars would be in the clear?
A. I have forgot, we measured that and I had that in my own figures, I have got it somewhere at home.
389 Q. Your best recollection?
A. From the switching point to clearing point?
Q. Yes.
A. It is something like One hundred and sixty some odd feet. Now that is just my judgment about it, it has been so long, I forget.
Q. To refresh your recollection didn't you say that to the point was about 110 ft.?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. My best recollection is that it was 160 some odd feet, but I can't say for sure.
Q. Do you remember whether or not there is a road crossing there in the photograph looking North there, does it show the road crossing in photograph No. 1?
A. Yes sir, here is the road crossing here of the South end.
Q. Have you any recollection now as to the distance from that switch point to that road crossing?
A. It is about 168 or 169 ft. somewhere along there.
Q. It is a little further than to the clearance?
A. Yes sir, there in only a very short distance in there from the frog to the crossing, it wouldn't anything like clear a half a car and clear the crossing.
Q. Now will you say you were familiar with that track there and familiar with the Rules, say that a North bound freight was
390 ordered, or it was necessary for the North bound freight to take that siding to let by 115 at Cumberland City, 115 was in the clearance there on the main, and it was followed by 103 a passenger train, and 114 the North bound freight had to take that siding

there to let both of those trains by, what would be the proper movement of that freight train that they had with the cars that were on the siding and the cars that was in the train, and it was necessary to saw by to let those trains by. How should the freight train crew manage or operate their train?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It is just according to where you are working on this train. The head brakeman when that train approached that side track there and found that it had meeting orders to meet this train standing on the main and had the right of way of the track and this switch was not throwed for the side track, he should throw the switch right here and pull in this side track up here, stay on the head end of his train and come up here and couple on to these cars on the siding, and it was always the case when we were sawing by trains my conductor was up there, and to couple on to those cars in here and go on down here and open up this North end switch.

Q. Who would open that up?

391 A. The head brakeman, and I would be at the head end of this switch and let the rear end come into the clear until I got a signal from the rear end that my train was clear, and some one would throw this switch back here, the South switch, and after you got off this switch it is closed at the South end.

Q. Who closes that switch?

A. The flagman is supposed to close it.

Q. That is the rear brakeman?

A. Yes. And when this train pulls on out here and when 115 pulls out and goes on down South, the flagman opens this South switch here and our engineer would blow 3 blasts of the whistle, the back up signal, and back up and let 103 in on the main track.

Q. Back up far enough to let the North end get in the clear and let 103 in on the main?

A. Yes sir, and then when she gets into the clear, open up the North end switch, pull up into clear and the rear man shuts the South switch, closes it, and then lets 103 by, and then our engineer would blow back-up again and obey his signal and back up through South switch and place those cars where they belonged and back on up and throw the South switch for the main track and they are done.

Q. Now what would be the duty of the flagman on that train after 115 had passed and you had closed that switch as you say, or

392 he had opened that switch to let 115 out, what ought he to do then, the flagman to the rear?

A. For his train to back up?

Q. Yes.

A. He ought to go and open up this swtich so his train can back up and let 103 in.

Q. What position should he occupy, where should he be?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Somewhere near this switch stand at a proper distance as the Rule provides for.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. What does the Rule provide?

(Objection sustained.)
The Court: "The Rule speaks for itself."

Q. What is the custom in managing that?
A. What the Rule is for that.

(Objection sustained.)
The Court: "You must introduce the Rule."

Q. I here show you Rule 117, was that Rule in effect at that time?
393 A. You will have to read it, I haven't my glasses, I know what it is though.

Rule 117 is introduced in evidence and here read to the jury by B. F. Procter, Att'y for Pl'ff, and is as follows:

"Whoever opens a switch shall remain at it until it is closed unless relieved by some other competent employe. When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it."

Att'y for Pl'ff here offers to introduce and also read to the jury as evidence, 117 *a*, to which Att'ys for Def't object. Objection overruled by the Court to which Att'ys for Def't except.

Rule 117 *a* is here read to the jury by Mr. Procter, Att'y for Pl'ff, and introduced as evidence, which is as follows:

"Rule 117 (*a*). A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.

No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main
394 track, take a position not nearer than 10 feet from the switch until the expected train has passed."

Q. Is that the Rule?
A. That is the Rule.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Q. Now Mr. Hagan, say that a brakeman has left the rear of his switch there at Cumberland City and has gone up into the station,

and the engineer blows the signal, 3 short blasts of the whistle indicating that he is going to back, what is the duty of that brakeman?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The duty of that flagman would be, after the engineer blew the 3 short blasts of the whistle, to go South to the South switch and throw this South switch, and the engineer *and the engineer* should blow the back up signal.

Q. Now then say that he did not throw that switch and the engineer had started backing with this switch closed against him and the caboose would run through that switch, and he did not have time to throw that switch, ought this flagman to let the train go through the switch, or apply the emergency?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

395 A. I would let any train on earth back up through any switch before I would open the angle cock on any engineer.

(Att'ys for Def't move to exclude the above answer, which is overruled, and to which ruling Att'ys for Def't except.)

Q. What would be the damage in running through the switch?

A. Two switch points bent or sprung.

Q. How much would they be sprung?

A. There would not be but one switch point damaged to amount to anything, and that would be the right hand switch point the one that was out from the rail.

Q. How much would that be open?

A. It would be sprung near to the rail of the main track.

Q. How far would that be?

A. A space of about 3½ or 4 inches, it springs the switch point over to the main track.

Q. Just the width of the flange is it?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Yes sir, one comes right against the rail and springs it over.

Q. How long does it take to repair that?

A. I never repaired one.

Q. Haven't you seen them repaired?

396 A. Yes sir.

(Objection by Atty's for Def't. Obj. overruled; to which Atty's for Def't except.)

Q. So train can go through?

A. Why this train, you can run through this switch as soon as you back up, get a spike maul out of the caboose. Anywhere from 4 to 5 minutes.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. When was it that you were down there making the measurements that you gave Mr. Procter?

A. About 3 days before this other trial.

Q. When was that?

A. Something like three years ago, I don't remember exactly.

Q. You hadn't been at Cumberland City for some time before that?

A. Well I should say I have, I have been up and down that road *often* and on all my life.

Q. How long since you worked for the L. & N.?

A. Something like 10 years now.

Q. In what capacity were you working when you quit?

A. Switching.

Q. Where?

A. St. Louis, the last work I done.

Q. How long since you worked on the main line or Memphis line?

A. It has been 13 or 14 years ago.

Q. Who made those photographs you have in your hand?

397 A. An old gentleman down there at Cumberland City.

Q. What is his name?

A. I can't tell you, he run a photograph gallery there.

Q. He is not here today?

A. I don't know.

Q. You haven't seen him?

A. No sir nor I haven't seen anybody else until I came in here. Haven't been in the court house until I just come in here before I got on the stand.

Q. You say that the distance from the switch point South of that siding to a point North of the switch point where cars would be in the clear was about 160 ft.?

A. Yes sir, I told you I had this set down and when this trial was before it was refreshing to my remembrance, but since that I can't recall those measurements.

Q. Did he ask you on the former trial, and did you make this answer: "Q. How far is it from the switch point South of that siding to a point North of the switch point where cars would be in the clear? A. 110 ft." Did you make that answer?

A. I think it was.

Q. How far is it from the switch point at the South end of the railroad crossing to the first opening of that siding coming North? and to Mr. Procter you answered "180 ft.," is that right?

A. I don't understand your question.

Q. The question was this: "How far is it from the switch

398 point at the South end to the road crossing, the first upon that siding as you come North?" You say "Where you first hit the crossing?" Q. Yes sir. A. I never measured that but it is something like 120 ft." Did you make that answer?

A. Yes sir, I think I did.

Q. This time you said about 180 ft.?
A. Yes sir, I might have varied some on these measurements, for I told you that it ain't in my remembrance now like it was then, I have it at home.
Q. Who went with you to make those measurements?
A. Mr. Procter.
Q. How long ago?
A. Three days before this trial was before.
Q. And you think that was about three years ago?
A. Something like it.
Q. How long did you stay there?
A. Went down in the morning and came back that night.
Q. Didn't you say before in answer to the question, that you were there two days?
A. I see in that deposition it was, but we went in the morning and came back that night.
Q. Then if you answered on the former trial that you stayed two days, you were mistaken?
A. Bound to be.
Q. And you were examined then about three days after that?
399 A. Yes sir, I noticed that in my deposition there.
Q. When did you read that?
A. Just a few days ago.
Q. Where?
A. At lawyer Procter's.
Q. You read your statements at the former trial a few days ago?
A. Yes sir.
Q. At Mr. Procter's office?
A. Not at his office, up on his porch at his home.

The photographs No. 1, 2, and 3, are here introduced in evidence, by Att'y for Pl'ff, and are the same photographs as were introduced in evidence on former trial of this case. Att'ys for Def't object — the said photographs being introduced in evidence, which is overruled, and to which ruling the Att'ys for Def't except.

Testimony of Dr. T. W. Stone Continued.

Mr. Hagan being introduced by agreement of parties to continue the examination of Dr. T. W. Stone, after the testimony of Mr. Hagan.

Direct examination continued by B. F. Procter, att'y for pl'ff:)

A. On his third visit when I found him in this condition I then told him to go home and that I would call and see him during the evening, which I did, being called before that time however
400 by his wife and before I intended to go, and I went and found him partly paralyzed in his right side, and it progressed

during the evening and night until he was completely paralyzed in the right side, and remained so until his death.

Q. Did he tell you how he received this blow?

(Objection sustained, to which Att'y for Pl'ff excepts.)

Q. Did you make a diagnosis, or post-mortem after his death?

A. We made a post-mortem after his death, yes sir.

Q. Tell what condition you found him in?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Upon examination we found on his left shoulder a previous bruise that at this time was getting to the yellow stage, and on opening the cranium we found the covering of the brain adhered to the cranium, and also the inner covering adhered to the brain. There was a considerable amount of bruising and some bloody serum in the ventricle.

Q. Did he receive any other injuries?

A. That is all.

Q. Did you examine the other functions or other organs?

A. We examined the whole chest and all the organs, and there was no disease we could find in kidneys, bowels, or stomach, and found no diseased tissue.

401 Q. Everything in a normal condition except the shoulder and brain?

A. Yes, except the shoulder and brain.

Q. Say that on Sept. 5th he had received an injury by being thrown against the side of the cab while acting as an engineer and he was in the condition you found him in on Sept. 6th and he had been in the condition you found him in at those other times you have stated, and then upon examination of his brain you found it in that condition, what would you say caused his death?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. The injury.

Q. The injury received by this contact with that cab?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. You mean by that the injury on Sept. 5th?

Q. In your judgment what caused that injury to his brain and shoulder, as to whether or not it was a tro-matic injury or otherwise?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. It was a tro-matic injury.

402 Q. What do you mean by that?

A. An injury caused by a blow or coming in contact with some substance other than the body.

Q. You had known him how long, before that?

A. Ten years at least.
Q. Had you doctored in his family?
A. I was his family physician and did all of his practice I take it.
Q. Tell the jury what was his condition prior to Sept. 5th, 1908?
A. Except an occasional complaint of external piles, or complaint of his stomach, he was in good health, he was not a robust man however. He did have an attack of grip, and then appendicitis in the spring and that ruptured without an operation and he got over it. That summer he seemed to be in better health than common, I never knew him to be in bad health although he was a slim made man.
Q. On a point of intelligence and industry?

(Objection by Att'ys for Def't.)
The Court: "He can state as to his habits for industry and sobriety, but the objection is sustained as to intelligence."

Q. What character of man?
A. He was a very industrious man and when he was not on the road he was always doing something about his place to make it look well, and he was a perfectly sober gentleman, I never knew
403 of him taking a drink in my life.

(Cross-examination by Jas. C. Sims, att'y for def't:)

Q. Dr., you remember exactly the first time in September you saw him?
A. September 6th my books show.
Q. He came to your office?
A. Yes sir.
Q. Where was your office?
A. At my residence on College Street.
Q. Where did he live?
A. On Clay street below the railroad.
Q. How far from you?
A. About six blocks or a little over.
Q. He walked to your office?
A. No sir, I think he came up on a grocery wagon.
Q. Anyone come with him?
A. No one came in the office.
Q. How long did he stay?
A. Possibly 30 minutes.
Q. You prescribed for him?
A. I did.
Q. What did you prescribe?
A. I don't remember, possibly the sedatives, and I ordered him to use something on the neck.
404 Q. You made no thorough examination of him?
A. I did.
Q. And found no outside indication of injury?
A. I found a bruise on his shoulder.
Q. No outward indication of injury to the head or neck?
A. He was complaining of pain, but no outward indication.

Q. When he left your office, he left walking?
A. Yes sir.
Q. When did you next see him?
A. I would say possibly four days after that, or five.
Q. Where did you see him that time?
A. At my office.
Q. By himself?
A. I don't know he was at the door before I knew he was coming.
Q. How long did he stay there the second visit?
A. Some 20 minutes the best of my recollection.
Q. Did you make any further examination?
A. Yes sir, I went over his head and neck again, and found his shoulder possibly not as sore as it was before, but his neck was more so.
Q. But no other outward indications?
A. No sir.
Q. Did you prescribe for him?
A. I did.
Q. Do you remember what?
A. Along the same line.
405 Q. Sedatives?
A. Yes sir.
Q. Something to relieve the condition?
A. Yes sir.
Q. Was he back at your office again after that?
A. I never saw him any more until the 23d.
Q. Where was it that you saw him on the 23d?
A. In the morning at my office.
Q. Did he come by himself?
A. Yes sir.
Q. Walking?
A. I do not know.
Q. How long did he stay at that time?
A. A very few minutes, not more than five minutes.
Q. Then he left alone, and when did you next see him?
A. That afternoon at his home.
Q. That was the time you say he was partially paralyzed in the right side?
A. On the morning visit at my office he was partially paralyzed because he could not speak like he wanted to but his hand and foot were not paralyzed, and he went home and went to bed and followed my orders, I told him that I would come after supper, but his wife called me in the middle of the afternoon I think.
Q. Did you see him any more after that?
A. I saw him again after supper, and three or four times a day until his death.
406 Q. At the time you are speaking of was the 23d before he died when?
A. On the 27th.
Q. That was on Sunday?
A. I don't recollect.

Q. You spoke of a post-mortem in answer to Mr. Procter, that was an autopsy?
A. Yes sir, one and the same thing.
Q. Who was present at that autopsy?
A. Dr. Huddle, Dr. Meredith, Dr. McCormack, Dr. Reardon and myself.
Q. They are all physicians here in town and all live here now?
A. Yes sir.
Q. Was the railroad surgeon present?
A. He was not.
Q. And no representative of the Railroad Company present?
A. No sir.

Testimony of Dr. A. T. McCormack.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Where do you live?
A. Bowling Green.
Q. How long have you lived here?
A. All my life, ever since I was four years old.
Q. How old are you now?
A. Forty-one past.
407 Q. Are you a graduate of any school of medicine?
A. Graduate of Medical Department of Columbia University in 1896, and no other medical schools.
Q. Have you taken degrees in other schools?
A. Have taken post-graduate courses in other schools, in New York, Philadelphia, Chicago and Rochester.
Q. What experience have you had in surgery in a hospital?
A. I was the attending surgeon in Bellevue Hospital in Paterson, New Jersey and since then have done all I could in Bowling Green, was in Paterson, N. J., in 1896 and 1897.
Q. What hospital have you had in Bowling Green?
A. St. Joseph's Hospital.
Q. Did you assist in the autopsy on W. H. Stewart?
A. Yes sir.
Q. Do you remember who was present?
A. Dr. Reardon, Dr. Stone, Dr. Huddle, and I don't remember who else.
Q. Was Dr. Meredith there?
A. Yes sir.
Q. I will get you to tell the jury if you reduced to writing the result and tell what you found?
A. I did reduce the result to writing.
Q. What did you find?
A. Can I have that report to refresh my memory?
Q. Just tell in your own way what you found on that autopsy and when and where it was held?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

408 A. It was held on September 28th 1908. This is written technical. There was a bruise and some swelling on the left shoulder in here. The top of the head, the skull was opened and the top of the head taken off and the outside skin of the brain, in it was found a large amount of bloody serum in the left side, the inner skin was very much congested and showed a sort of gluey condition that attached it to the brain substance along over the centers of motion of the left side. Then the brain was removed and sections made through it, and in the left ventricle there was a lot of bloody serum, and the right side of the brain was normal, and it was the opinion of the five doctors present at the autopsy——

(Objection sustained.)

It was my opinion that the cause of death was injury to the left side of the head.

Q. Say he had received an injury on the left side of his head by being thrown against the cab window, and you had found his head as you found it there, what would you tell the jury was the cause of his death?

(Objection by Att'ys for Def't. Obj. overruled, to which Att'ys for Def't except.)

A. Caused by that injury if that was the only one he had sustained, caused by an injury to the left side of his head. Dr.
409 Stone stated the history of the case at the autopsy, of course we could not have based it without that history.

Q. How long had you known W. H. Stewart?

A. We went to school together in the public schools.

Q. Tell the jury what sort of man he was?

(Objection.)

Q. From point of health?

A. He had always been a very healthy man, I had done practice for every member of his family but him. He had had a spell of illness, but he was a strong, healthy, spare made man, a hard working boy or man, a very healthy man as far as I knew. I did practice for his sister and his mother, and saw him frequently, he always paid the bills.

Q. From a point of sobriety and morality?

A. He was all right, a hardworking, industrious boy, and sober and a good husband and father.

(Att'ys for Def't move to exclude the latter part of the above answer from the jury as to his being a good husband and father. Objection sustained.)

Att'ys for Pl'ff here offer to introduce the American Life Tables from book, to which Att'ys for Def't objected, and the Court ruled that they should put the witness on the stand to introduce said tables.

410 The testimony of Miss Reardon as taken down upon the former trial of this case, is here introduced in evidence, and read to the jury by Att'ys for Pl'ff. Att'ys for Def't objected to the

introduction of said testimony in evidence and to the reading of same to the jury, which is overruled, and to which ruling Att'ys for Def't except.)

Also the testimony of Mrs. Sarah A. Sherrell as taken down upon the former trial of this case, introduced in evidence by Att'ys for Pl'ff, and read to the jury.

Testimony of Mrs. W. H. Stewart, Recalled.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Mrs. Stewart, what is your age now?
A. Thirty-three.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

Testimony of Geo. H. Galloway.

For the Purpose of Introducing the American Life Tables.

(Direct examination by B. F. Procter, Att'y for Pl'ff:)

Q. Have you ever had any experience in Life Insurance?
A. Yes sir, some.
Q. Have you ever been a Life Insurance Agent for any standard Company?
A. Yes sir.
411 Q. Are you an agent for any Standard Company now?
A. No sir.
Q. Are you familiar with the Tables of Mortality as shown for expectancy of life, as shown by the Carlyle or other standard tables?
A. Yes sir I think so.
Q. Tell what the expectancy of life is of a man 34 years of age?
A. 28.62 years.
Q. If he is 34 years of age the expectancy of life is how much?
A. 28.62 years.

(Cross-examination by Jno. B. Rodes, Att'y for De'f:)

Q. From what table, Mr. Galloway, did you read?
A. I read from table known as the Wiggleworth Table.
Q. Is that a table of American mortality?
A. I can't tell you whether it is or not, I never looked into it.
Q. May it or not embrace English mortality?
Q. Yes, it may.
Q. You don't know about that?
A. No sir, it does not embrace English, only United States.
Q. Only American mortality?
A. Yes.
Q. Isn't it a fact that those tables are based on the experience as to the general average of the lives of men in all occupa-
412 tions?
A. Yes sir, it is not confined to one occupation.

Q. It is not confined to the business of railroading?

A. No sir.

Q. The business of railroading is an extra hazardous occupation, is it not?

A. I think so.

Q. The expectance of life of that peculiar class of men engaged in railroading, based on a general average, would be less than the table based on the expectancy of life of men engaged in all occupations?

A. Yes sir, it would be.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. Isn't it true that the expectancy of life according to the American Mortality Tables, and the experience in the life statistics, shows that the age of men is increasing owing to sanitary conditions and other conditions at the present time?

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

A. Well, I have heard some such statements as that.

Q. As a matter of fact doesn't Judge Hobson say so in the Houchins case and other cases that the expectancy of life is prolonged?

(Objection sustained.)

413 Rules 117, 117 (*a*), 86, 104, and 133, from the Revised Rules for the Government of Transportation, &c., are admitted in evidence. The Court sustains the objection to the introduction of Rules 69, 119 and 44, in evidence.

Rules 117, 117 (*a*), 86, 104, and 133 are read as follows:

Rule 117.—Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen; except where switch tenders are stationed. Whoever opens a switch shall remain at it until it is closed, unless relieved by some other competent employe. When there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it."

Rule 117*a*.—A train about to enter or leave a siding must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp. No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. At meeting or passing points the employe attending the switch will, after locking it to main track, take a position not nearer than ten

414 feet from the switch until the expected train has passed.

Rule 86.—When a train of inferior class meets a train of superior class on single track, the train of inferior class must take the siding and clear the train of superior class five minutes. A

train of inferior class must keep ten minutes off the time of a train of superior class following it."

Rule 104.—When a train is being pushed by an engine (except when shifting and making up train in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman.

Rule 133.—The general direction and government of a train from the time of receiving its passengers or freight until its arrival at its destination, is vested in the conductor. He is held responsible for its safe and proper conduct, and all men employed on the train are required to yield a willing obedience to his proper orders.

Testimony of H. T. JONES, recalled for further cross-examination, to which Att'y for Pl'ff objects. Objection is overruled, and Att'y for Pl'ff excepts.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. Mr. Jones, you stated to Mr. Procter, if I understood you correctly, that as you stood there at Cumberland City after giving the signal to the engineer to back the train, that the entire train
415 was within your vision?

A. Yes sir.

Q. As you stood there and as the train backed, were you in a position to then and there locate the position of the caboose?

A. Yes sir.

Q. Were you then able from where you were to tell the locality of the caboose with reference to the South switch?

A. Approximately, yes sir.

Q. Within what number of feet in your judgment would you have been able to locate the caboose from where you stood?

A. Within at least 20 ft.

Q. Were you or not from that position able to protect the switch from the caboose or vice versa?

A. Easily.

Q. Have you a Time Card?

A. Yes sir.

Q. What do you mean by the Time Card?

A. Just a printed form showing the schedules of all regular trains at all stations.

Q. Have you the last Time Card?

A. Yes sir.

Q. Issued to Conductors upon your Division?

A. Yes sir.

Q. Will you let me see it?

A. Yes sir.

416 Q. Is that sometimes called a Time Table?

A. Yes sir.

Q. What number is this?

A. 114.

Q. And went into effect when?

A. January 8th 1914 at 7 o'clock P. M.
Q. And is in effect now?
A. Yes sir.
Q. State whether or not you and all other conductors on your Division operate on that time table?

Mr. Procter: "We object to that, the Time Table in effect September 1908 is what we want."

Q. State whether or not the time table issued by the Company and which you have exhibited to me shows the stations from Memphis Junction on South through and apast Cumberland City, and the car capacity of the sidings or sidetracks along said stations, based upon 40 ft. per car?

Mr. Procter: "We object unless he gets the Time Table that was in effect at this time."
Objection is overruled, to which Att'y for Pl'ff excepts.

A. Yes, this Time Table shows the car capacity of the Cumberland City siding based upon 40 ft. per car.
Q. What was the car capacity of that side track at Cumberland City, and what is it now?
A. 41 car lengths.
Q. Based upon 40 ft. to the car, is that correct?
417 A. Yes sir that is correct.

The Time Table is here introduced in evidence, and marked Exhibit X and filed herewith, or those portions thereof showing its number, its time of issue, and when it went into effect upon the first page thereof, and showing the car capacity of passings sidings based upon 40 ft. per car at Cumberland City.
Att'ys for Pl'ff object to said Time Card being introduced, which is overruled, and to which Pl'ff excepts.
Att'y for Def't reads those portions introduced, to the jury, as follows:—
Time Table between Memphis Junction and Paris, North Bound Cumberland City Car capacity of passings siding based upon 40 ft. per car, 41 cars.

Q. How long have you been operating on that Division, Mr. Jones and running as conductor?
A. I was promoted on this Division in 1903.
Q. And have been since that time on that Division?
A. Two or three years ago and possibly longer we have been operating both ways from Paris.
Q. You have passed there frequently?
A. Yes sir.
Q. Independent of that Time Table what is your best
418 judgment of the car capacity of that siding based upon 40 ft. to the car?
A. I think that is correct, 41 cars.
Q. At times the capacity varies according to the length of your car, some cars are 50 ft. long, and the capacity on each occasion is

governed by the number of cars in the train, the average would be 40 ft., but some go over that.

Q. That would be the average 40 ft. per car?

A. Yes sir.

Q. What do you operate your trains by, that Time Table or Time Card?

A. Yes sir, that Time Table.

Q. When you are actually on the road, do you or not carry one with you?

A. Yes sir.

Q. In the actual operation of your train?

A. Yes sir.

Q. Mr. Procter showed you yesterday a book showing the list of stations and names of agents of the L. & N. Railroad Company at Cumberland City, and the name of C. T. Jacobson Agent, and a column showing the clearance length of siding as 720 ft. opposite the name Cumberland City, state whether or not at that time and now that is a mistake?

A. That is an error.

Q. No question about it?

419 A. No sir.

(Redirect examination by B. F. Procter, Att'y for Pl'ff:)

Q. What was the capacity of that siding there in 1906 or first of January 1907?

A. I would have to refer to the records to give that accurately.

Q. Give your best judgment?

A. I don't remember when that siding was extended.

Q. That siding has been extended?

A. Yes sir, it was originally much shorter, it was supposed to clear 18 cars.

Q. You don't know when that change was made?

A. No sir.

Q. I show you here Time Table No. 86 that went into effect December 2nd 1906 at 6 P. M., and I will get you to examine that and state if that Time Table does not fix the capacity of that siding there at 18 cars?

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

A. Eighteen is right, on this card.

Q. And I understand you don't know when that change was made?

A. No sir, I have no accurate information when the change was made, we are notified when each change is made.

Q. I am not asking you about that.

Att'y for Pl'ff reads Time Table 86 to the jury as follows:—"Car capacity of passing siding based on 40 ft. per car, 18. Time

420 Table No. 86 Memphis Line takes effect Sunday December 2, 1906 at 6 P. M."

Said Time Table is here introduced in evidence, & marked "Exhibit Y" & filed herewith.

(Objection by Att'ys for Def't. Objection overruled; to which Att'ys for Def't except.)

(Recross-examination by Jno. B. Rodes, Att'y for Def't:)

Q. Mr. Jones you said to Mr. Procter that that siding had been extended?

A. Yes sir.

Q. Formerly you recollect its capacity was 18 cars?

A. Yes sir.

Q. And that is just what shows isn't it?

A. Yes sir.

Q. The old siding was 18 cars and was extended to hold a larger quantity of cars?

A. Yes sir.

Q. In your judgment did that siding hold in 1908 just what that time table shows, and holds the same now?

A. It held the same in 1908 as it does now.

Q. Was or not that extension you have referred to, prior to 1908?

A. Yes sir.

(Objection by Att'ys for Def't. Obj. overruled; to which Att'ys for Def't except.)

421 At the close of the testimony for Plaintiff, Att'ys for Def't moved the Court to peremptorily instruct the jury to find for Defendant, which motion is overruled by the Court, and to which ruling Defendant excepts.

Testimony for Defendant.

Testimony of J. H. Kelley.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. Your name is J. H. Kelley?

A. Yes sir.

Q. Where do you live?

A. Cumberland City.

Q. Tennessee?

A. Yes sir.

Q. What is your position with the L. & N. Railroad Co.?

A. I am track foreman now.

Q. How long have you held that position?

A. Since about the 7th day of February 1893.

Q. Mr. Kelley do you know the length of that siding at Cumberland City?

A. Yes sir.

Q. Have you measured it recently?

422 A. Yes sir I measured it yesterday evening.

Q. And come up here when?

A. On 104, got here about 5 o'clock.

Q. What does that siding measure from the North switch point to the South switch point?

A. 1977 ft. by the tape line.

Q. What in your judgment would be the car clearance measuring that distance?

A. I never figured on it but I think about 41 cars.

Q. Was there ever an old siding there before this new one was made?

A. Yes sir.

Q. Was that old siding shorter or longer than the present one?

A. It was shorter.

Q. Are there any marks there to show you where the old switch stands were?

A. There is no marks to show where the stand is, but there is one where the frog was made, where it entered the main.

Q. Have you measured how long it was where the marks showed it entered the main track?

A. Yes sir.

Q. How long was the old siding?

A. 1028 ft.

Q. By your measurement?

A. Yes sir I measured from where the frog was to the switch point at the South end of the old siding, I then measured from
423 the switch point at the south end of the old siding to where the frog sets on that end and that gives me a distance, I won't say positive as to the number, but it is about 1,028 ft.

Q. What would be the car clearance of that old siding?

A. About 16 cars, somewhere along there, I never figured on it, I couldn't state as to the clearance.

Q. Can you state the time when that siding was extended and made longer?

A. I can't state positively, it has been seven or eight years ago, I don't recollect the exact date.

Q. What effect would a train running through a closed switch have?

A. Why sometimes a serious effect, and sometimes it doesn't hurt it very bad, we have had in one particular case where it ruined the switch stand and didn't hurt the points, it bent the rod that runs through the switch stand, and it took me and my men pretty near all day to locate the trouble, and sometimes it will spring it pretty bad and sometimes not so bad, it is owing to how bad the points are worn.

Q. Is there any effect on the rail?

A. The switch points are bent and frequently so you have to take them out and heat them and straighten them.

Q. Is there any probable effect to the cars themselves?

A. Yes sir it is probable for them to get off but they don't always do. I have heard of it, I never saw it.

424 Q. Should that happen, state whether or not there would be any delay to traffic or any trouble in getting traffic on its usual course again?

A. Yes sir because if it is at a point where it is connected with the main line track, it is delayed until those cars are put on again, it can't pass.

Rule 154 is here introduced in evidence, under the title "Rules for Conductors, Flagmen, Brakemen and Train Porters", by Att'y for Def't, and same is read to the jury as follows:—

Rule 154. They will see that their trains do not obstruct any public street or road-crossing more than 5 minutes at one time.

Testimony of Dr. Sanders.

(Direct examination by Jno. B. Rodes, Att'y for Def't:)

Q. What is your profession?
A. Dentist.
Q. How long have you been practicing in Bowling Green?
A. Have been here nearly six years, six years next September.
Q. Did you ever live in Tennessee?
A. Yes sir, all my life.
Q. Are you familiar with the surroundings at Cumberland City of the tracks of the L. & N. Railroad Company?
A. Yes sir.

Q. Was there ever an extension of the side track at Cum-
425 berland City?

A. Yes sir.
Q. Do you remember that it was made longer?
A. Yes sir.
Q. About how much longer than the old side track was it made?
A. I think about twice as long, a good deal longer.
Q. Was it extended before 1908?
A. It was before I left there and I left in 1908.

(Cross-examination by B. F. Procter, Att'y for Pl'ff:)

Q. When was your attention called to that? When did you leave there?

A. I left there, I never lived there, I lived in Erin, and I left Erin in 1908, I went to Cumberland City once a week.

Q. When was your attention first called to that?

A. I happened to be coming down town a few minutes ago and I spoke of you having asked me if I knew Mr. Kelley, and he asked me if I knew when that track was changed and I told him I did, and he said he would have me summoned, I have known Mr. Kelley 20 years.

Q. Your attention was never called to it before?
A. I didn't know a thing on earth about it.

(Redirect examination by Jno. B. Rodes, Att'y for Def't:)

426 Q. What did he ask you about Mr. Kelley?

A. He asked me what kind of a man Mr. Kelley was, and I told him he was straight and all right, a mighty nice gentleman.

Testimony of Mr. L. T. Becot.

(Direct examination by Jno. B. Rodes, for Def't:)

Q. What are your initials?
A. L. T.
Q. How old are you?
A. Fifty-two.
Q. Where do you live?
A. Paris, Tennessee.
Q. Are you in the employ of the L. & N. Railroad Co.?
A. I am.
Q. What position do you hold?
A. Chief Clerk in F. J. Monahan's, Master Mechanic's office.
Q. I will get you to tell the jury what the monthly earnings of W. H. Stewart was from January 1908 to September 1908, month by month?
A. The month of January $150.44. February, $6.10. March $9.00. April $12.20. May $69.15. June $67.10. July $66.10. August $116.36. Sept. $68.70 that is up to the last trip he made on the 16th *od* September.

427 The Court: "On reflection the Court excludes from the jury all testimony relating to the attitude of decedent towards his family, his conduct in and about his home, and all other testimony relating to his habits, except as to his habits for sobriety and industry, and the testimony in that regard is to be considered only as affecting his power to earn money.

To the above ruling of the Court, Plaintiff and Defendant except.

Counsel for Defendant moves the Court to now discharge the jury and continue the case for another trial. Motion is overruled, to which Att'ys for Def't except.

Counsel for Def't again moves the Court to peremptorily instruct the jury to find for Def't, which motion is overruled, and to which ruling, Att'ys for Def't except.

428 COMMONWEALTH OF KY.,
County of Warren, set:

I, Belle Galloway, Official Stenographer for the Warren Circuit Court, do certify that the foregoing transcript is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected, and all exceptions, objections, and avowals, concerning the same as well as all papers and exhibits offered to be or used as evidence in the trial.

Witness my hand this Oct. 20th, 1914.

BELLE GALLOWAY,
Official Stenographer, Warren Circuit Court.

Stenographer's Fees.

1914.
Oct. 20, To copying transcript of testimony—203 pages at 25¢ each $50.75
To carbon copy—203 pages at 5¢ each..... 10.15

Total..... $60.90

Examined and approved in open court this 2 day of November, 1914.

McKENZIE MOSS,
Judge Warren Circuit Court.

428½ The following endorsement appears on the transcript of the record on the second appeal in this case:
"1914, December 8th, Old Record of same style placed with this appeal."

429 The following is a judgment of affirmance of the Court of Appeals entered herein on the 26th day of March, 1915:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.
It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.
It is further considered that appellee recover of appellant her costs herein expended.

430 The following is the opinion of the Court of Appeals delivered on March 26th, 1915:

431 Court of Appeals of Kentucky, March 26, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
WILLIAM H. STEWART'S ADMINISTRATRIX, Appellee.

Appeal from Warren Circuit Court.

Opinion of the Court by Judge Hannah, Affirming.

William H. Stewart, a locomotive engineer in the service of the Louisville & Nashville Railroad Company and engaged in interstate

commerce, was injured at Cumberland City, Tenn., on September 5, 1908, and died on September 27, 1908, as the result of his injuries. His widow was appointed administratrix of the estate, and she instituted this action in the Warren Circuit Court to recover damages for the negligent killing of her husband and intestate, for the benefit of herself and four children.

There was a verdict and judgment in her favor, which upon appeal was reversed. See 156 Ky., 550, 157 Ky., 642; 161 S. W. 557, 163 S. W. 755.

Upon the return of the case to the circuit court, there was a second trial, which resulted in a verdict and judgment in plaintiff's favor in the sum of $11,885, apportioned as follows: to the widow and the three older children, $2,472 each, and to the young-
432 est child, $4,469. The railroad company again appeals.

Stewart was the engineer in charge of the locomotive of a freight train proceeding northward on the day mentioned. Jones was conductor of the train, and Hill rear brakeman. On reaching Cumberland City, they met a south-bound freight train, which was standing on the main line just north of the switch at the south end of the passing track. Stewart's train entered upon this passing track at the south switch thereof and proceeded north thereon, pushing ahead of the locomotive several cars which were found standing on the passing track. On reaching the north end of the passing track, it was found that the rear end of the train was not yet in the clear at the south end of the passing track, and in order to let the south-bound train which was standing on the main line proceed, they opened the switch at the north end of the passing track and pulled the front end of the train out on to the main line. After this was done and the southbound freight train had gone, it was necessary to arra-ge for a south-bound passenger train which was approaching Cumberland City. Jones, the conductor, gave to Stewart, the engineer, a signal to back up. This was done while the front end of the train was out on the main line, the purpose of backing the train being to clear the north end of the passing track so the passenger train could pass on the main line. While the train was backing, Hill, the rear brakeman, applied the air-brakes suddenly by opening an angle-cock, causing Stewart's head to strike a portion of the cab, whereby he sustained the injuries from which it was claimed his death resulted.

433 On the first trial of the case, the testimony of the conductor Jones was not available, but the rear brakeman testified; and in the opinion on the former appeal based upon the evidence as it then appeared, the court held that there was sufficient evidence of negligence upon the part of the conductor to take the case to the jury; but that Hill, the rear brakeman, was not negligent.

The conclusion- stated in the former opinion based upon the evidence then appearing, were that under the rules the rear brakeman properly locked the south switch after his train had passed onto the passing track; that he properly went toward the front of the train for the purpose of cutting a crossing which was blocked by the train; and that when the train began to back, finding that he did not have

time to reach the south switch and throw it, he properly stopped the train by opening the angle-cock. And, that as to the conductor, he gave the order to back the train when he knew or should have known that the switch was locked, that the rear brakeman had to attend to the cutting of the blocked crossing and was therefore absent from the switch, that his train was too long to be in the clear at both ends of the passing track at the same time, and that when he backed it far enough to be in the clear at the north end, it would run out on to the main line at the south end, and that therefore the conductor was negligent, or at least there was sufficient evidence of negligence on his part to take the case to the jury.

434 On the second trial, however, Jones, the conductor, was present and testified, and a different state of facts was presented.

Jones testified that the length of the passing track was 32 to 34 car lengths; that he had thirty three or thirty four cars in his train; that when he gave the signal to back he could see both ends of his train; that it was not his intention when he gave the signal to back, to leave the siding, that is, for the rear end of the train to pass out on to the main line; that in his judgment he could have backed the train far enough to have cleared the main line at the north end of the siding without backing the caboose of the train as far as the south switch thereof. It is shown in the record that the train could have backed something over a hundred feet after the caboose would reach the point where it would foul tne main line, before coming to the switch itself; and that there was approximately forty feet of "slack" in a train of that length which could be taken up. In addition, it is not shown how far out on the main line at the north switch the train was; so that under the evidence as presented on the last trial it is not beyond the possibilities that the conductor could have cleared the main line at the north switch without backing the caboose over the closed south switch.

435 But, it is to be noted that the conductor testified that he had to "saw by" the south-bound freight train which they met at Cumberland City; and if this was absolutely necessary, that is, if his train was so long that the front end of it had to be run out on to the main line at the north end of the passing track in order that the rear end of the train at the south end of the passing track would clear the main line, then it would necessarily follow that to clear the main line at the north end of the passing track, the rear end of the train would have to be backed out on to the main line at the south end thereof. The record, however, does not conclusively establish such to be the fact. In pulling his train up on the passing track, it was pulled far enough to clear the first crossing to the north of the south switch, and possibly farther, the evidence is not clear on this point; but it may not have been very far out on the main line at the north end of the passing track, and its length may have been such that it could have all been placed on the passing track, clearing the main line at the north end, and without the rear end extending past the south switch.

436 So that the testimony of the conductor presented an entirely different state of facts from those obtaining on the first trial, and upon which the opinion on the former appeal was based; and upon the second trial, there was some evidence of negligence upon the part of Hill, the rear brakeman, in acting too hastily, and in assuming that the purpose of the conductor was to back the rear end of the train over the closed south switch, or that it would be necessary to do so in order to clear the main line at the north switch.

Realizing that the negligence which caused the injuries of the engineer was either that of the conductor or of the brakeman, depending upon the view-point, the court instructed the jury that if the defendant's agents and employees in charge of its train, or any of them, negligently operated it so as to cause Ste-art's injuries, they should find for the plaintiff; and also gave an instruction dealing especially with the alleged negligent act of the rear brakeman, Hill, in opening the angle-cock and applying the brakes in that manner.

Of this appellant complains insisting that as the court held in the opinion on the former appeal that Hill was not negligent, it was error to instruct in regard thereto. But as we have heretofore explained, the evidence in respect of these matters was radically different upon the second trial, and of course, the instructions vary as the facts vary.

2. Plaintiff administratrix testified for herself upon the trial, and while doing so, held in her lap her youngest child. This child was six years of age, and afflicted in mind. Defendant objected
437 to the exhibition of this child before the jury, and at the conclusion of plaintiff's examination in chief moved the court to discharge the jury and continue the case on account thereof; and it is contended here that the court erred in permitting this child to be exhibited before the jury, and in admitting evidence concerning its mental condition.

Appellant contends that the verdict is excessive at least to the extent of the $1,997 awarded to this child more than to the others, and that this was produced by the exhibition of the child before the jury.

Under the Act, this child was a beneficiary and entitled to participate in the recovery, and the exhibition of the child to the jury resulting from its presence in the court-room is not grounds for complaint unless an excessive verdict was thereby induced. We do not think the verdict excessive, either as to the gross award, nor as to the sum apportioned to the child. The pecuniary loss to it resulting from the negligent killing of the father was necessarily greater than to the other children.

3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the state courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict by twelve men, as required
438 by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon state courts not so consti-

tuted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant that Congress by the Act of April 5, 1910, amending the Federal Employers' Liability Act did not grant jurisdiction to state courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claims. Ches. & Ohio Ry. Co. v. Kelly's Admx., 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr., 161 Ky. 824.

4. It is also contended by appellant that the trial court erred in refusing to give the instruction requested by it requiring the jury to believe that the plaintiff had established the issues by a preponderance of the evidence before they could find for her. This matter was likewise disposed of in the cases above mentioned.

5. Appellant also contends that the evidence failed to establish that the blow upon the head received by Stewart when Hill opened the angle-cock, resulted in his death. The evidence upon this
439 issue was conflicting but there was sufficient evidence to show that such was the proximate cause of his death. In fact we think it clearly does so and we will not disturb the finding of the jury in respect thereof.

The judgment is affirmed.

Sims & Rodes, Bowling Green; Benjamin D. Warfield, Louisville, Ky., for appellant.

Wright & McElroy, Bowling Green, Ky.; Hazelrigg & Hazelrigg, Frankfort, Ky.; B. F. Procter, Bowling Green, for appellee.

440 On the 30th day of April, 1915, the Appellant and Plaintiff in Error by its counsel filed in the office of the Clerk of the Court of Appeals its Petition for Writ of Error, which petition is in words and figures following, to-wit:

441 UNITED STATES OF AMERICA, *ss:*

Commonwealth of Kentucky to the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Louisville & Nashville Railroad Company, respectfully shows that on the 29th day of April, 1915, the Court of Appeals of Kentucky rendered a final judgment against your petitioner in a certain cause, brought under the Employers' Liability Act of Congress of April 22, 1908, to recover damages for the death of one of your petitioner's employes which occurred on September 27, 1908, and in which cause your petitioner was Appellant, and Jeanette Stewart, as Administratrix of the Estate of William H. Stewart, deceased, was Appellee, affirming the judgment of the Circuit Court of Warren county, Kentucky, wherein the said Jeanette Stewart, as Administratrix aforesaid, was plaintiff, and your petitioner was defendant, as will appear from the record of the proceedings in said

cause, and that said Court of Appeals of Kentucky is the highest court in said State in which a decision in said suit could be had; and your petitioner further shows that in said order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, said petitioner prays that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of, and that a Transcript of the Record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

442

JAMES C. SIMS.
JOHN B. RODES.
HENRY L. STONE.
BENJAMIN D. WARFIELD.

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed, this 30th day of April, A. D. 1915, the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Seventeen thousand five hundred dollars, ($17,500.00).

Done at Frankfort, Kentucky, this 30th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 30th day of April, 1915, A. D.

____ ____,
Clerk Court of Appeals of Kentucky.

Filed Apr. 30 1915. Robt. L. Greene, C. C. A.

443 At the same time, to-wit, April 30, 1915, the Appellant and Plaintiff in Error filed its Writ of Error and allowance of same in said clerk's office, which is in words and figures following, to-wit:

444 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honourable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Louisville & Nashville Railroad Company, Appellant, and Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an

authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honourable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Kentucky, on the 30th day of April, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Eastern Kty. Dist. Court, United States of America.]

JNO. W. MENZIES,
Clerk of the District Court of the United States in and for the Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by—
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Ky.

[Endorsed:] Filed Apr. 30 1915. Robt. L. Greene, C. C. A.

445 At the same time, to-wit, April 30, 1915, the Appellant and Plaintiff in Error filed in said clerk's office its Assignment of Errors, which is in words and figures following, to-wit:

446 In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Assignment of Errors.

Now comes the Plaintiff in Error, Louisville & Nashville Railroad Company, by James C. Sims, John B. Rodes, Henry L. Stone and Benjamin D. Warfield, its attorneys, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the Commonwealth of Kentucky in the above entitled cause, which was brought and prosecuted under the Employers' Liability Act of Congress, of April 22, 1908, there is manifest error to the prejudice of this Plaintiff in Error in this, to wit:

First. The said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Warren Circuit Court of Kentucky for the sum of Eleven Thousand Eight Hundred and Eighty Five Dollars, ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said defendant in error and against said plaintiff in error.

Second. The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Warren Circuit Court, and in not remanding said cause to said Warren Circuit Court for a new trial.

447 Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the plaintiff in error, to find a verdict in favor of the plaintiff in error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the plaintiff in error.

Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, instruction No. 4, as follows:

"No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

Said instruction No. 4, to the giving of which to the jury plaintiff in error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages "to the amount of" the employe's negligence, instead of, as required by section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe.

448 Fifth. The said Court of Appeald of Kentucky erred in sustaining and approving the action of the said Warren Circuit Court, and in holding that said court had committed no error, in giving to the jury, on the court's own motion, and over plaintiff's objection and exception, instruction No. 5, reading as follows:

"No. 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff."

Said instruction No. 5 being erroneous because of the qualifying clause contained at the end of said instruction, reading as follows:

"Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff,"

as there was no evidence of negligence of any of plaintiff in error's agents or servants other than conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake; and was also erroneous in directing the jury positively and without qualification to "find for plaintiff" (defendant in error) if the necessity for the application of the emergency air brake had been brought about by defendant's (plaintiff in error's) agents or servants in the negligent operation of the train; the qualification, which the trial court directed the jury would justify a verdict for the plaintiff, (defendant in error) being obscure and misleading.

449

Sixth. The Court of Appeals of Kentucky erred in sustaining and

approving the action of the trial court in giving to the jury, on the court's own motion, and over the objection and exception of the plaintiff in error, instruction No. 7, reading as follows:

"No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict."

And said Court of Appeals of Kentucky also erred in sustaining and approving the action of the trial court in refusing to give to the jury instruction C offered by defendant, plaintiff in error here, and which instruction reads as follows:

"C. The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

And to which said action of said trial court in refusing to give said instruction C plaintiff in error excepted at the time.

Said instruction No. 7 was erroneous, and the refusal to give said instruction C was erroneous, in that thereby the jury was authorized to find a verdict by only nine, or ten, or eleven of the twelve jurors in violation of the Seventh Amendment of the Constitution of the United States, a limitation upon Congress in enacting the Act of Congress known as the Federal Employers' Liability Act of April 22, 1908, upon which said Act this cause of action is founded, and a limitation upon every court and tribunal which entertains for trial causes of action, such as this one, arising under the said Act of Congress, this being a suit at common law where the value in controversy exceeds twenty dollars, and in which, by the said Seventh Amendment, right of trial by jury shall be preserved.

450 Said Court of Appeals of Kentucky further erred in its construction of said Seventh Amendment of the Constitution of the United States, as applied to this cause, as shown by the opinion of Hannah J., filed in said Court of Appeals of Kentucky for the said court, March 26, 1915. (163 Ky. 823), as follows:

"3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the state courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict of twelve men, as required by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon state courts not so constituted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant that Congress, by the Act of April 5, 1910, amending the Federal Employers' Liability Act did not grant jurisdiction to state courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

"Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claim. Ches. & Ohio Ry. Co. v. Kelly's Admrx. 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr. 161 Ky. 824".

For the foregoing prejudicial errors and each of them affecting the

merits of this cause the plaintiff in error prays a reversal of the judgment of said Warren Circuit Court of Kentucky and of the judgment of affirmance thereof by the said Court of Appeals of Kentucky.

And the said Louisville & Nashville Railroad Company, as plaintiff in error, prays that the judgment aforesaid, for each of the errors aforesaid, whereby the plaintiff in error has been deprived of its rights, privileges and immunities, be reversed, annulled and held for naught.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JAMES C. SIMS,
JOHN B. RODES,
HENRY L. STONE,
BENJAMIN D. WARFIELD,
Its Attorneys.

451 I, B. F. Procter, counsel for defendant in error, Jeanette Stewart, Admx. of the estate of Wm. H. Stewart, deceased, hereby accept service of the foregoing assignment of errors, by receiving copy of same.

Given under my hand this April 24th, 1915.

B. F. PROCTER,
Counsel for Defendant in Error, Jeanette Stewart, Adm'r'x of the Estate of Wm. H. Stewart, Deceased.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

452 At the same time, to-wit, on April 30, 1915, the Appellant and Plaintiff in Error filed its Writ of Error Bond, which is in words and figures following, to-wit:

453 Court of Appeals of the State of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

Supersedeas Bond.

Know all men by these presents: That the Louisville & Nashville Railroad Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto Jeanette Stewart, as Administratrix of the Estate of William H. Stewart, deceased, in the sum of seventeen thousand five hundred dollars ($17,500.00) to be paid to the said obligee, and to her successors in office, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents,

In testimony whereof we have hereunto subscribed our names and affixed our seals this 30th day of April, A. D. 1915.

Whereas the above named, Louisville & Nashville Railroad Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

454 [SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER.
NATIONAL SURETY COMPANY OF NEW YORK,
By J. MORTON MORRIS,
Its Attorney in Fact.

STATE OF KENTUCKY,
County of Jefferson, sct:

I, F. P. Caldwell, a Notary Public within and for the above named county and State, certify that on this day and in said county and State the foregoing instrument was produced to me, and was acknowledged by W. L. Mapother, First Vice President of the above named Louisville & Nashville Railroad Company, to be its act and deed, and was also acknowledged by J. Morton Morris, attorney in fact of the above named National Surety Company of New York, for and on behalf of said Surety Company to be its act and deed.

Given under my hand and official seal this 30th day of April, A. D. 1915. My commission expires March 14th, 1918.

[SEAL.] J. P. CALDWELL,
Notary Public, Jefferson County, Kentucky.

I hereby approve the foregoing bond and surety, this 30th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

455 Afterwards, to-wit, on May 4, 1915, the Appellant and Plaintiff in Error filed its Citation with return of service on same:

456 UNITED STATES OF AMERICA, *ss:*

In the Court of Appeals of the Commonwealth of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
v.
JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased, Defendant in Error.

You, Jeanette Stewart, as administratrix aforesaid, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error issued out of this court and filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein said Louisville & Nashville Railroad Company, is plaintiff in error and the said Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honourable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 30th day of April, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky.

Copy of the above citation received and service accepted this 3rd day of May, A. D. 1915.

B. F. PROCTER,
Of Counsel for Defendant in Error.

Filed May 4, 1915. Robt. L. Greene, C. C. A.

[Endorsed:] Filed May 4, 1915. Robt. L. Greene, C. C. A.

457 And on the 30th day of April, 1915, the Appellant and Plaintiff in Error filed its Præcipe, which is in words and figures following, to-wit:

458 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

Præcipe of said Appellant, Now Plaintiff in Error.

In conformity with Rule 8 of the Supreme Court of the United States, and in order to the preparation of the Transcript of Record upon the Writ of Error from said Supreme Court to the Court of Appeals of Kentucky, the above named, Louisville & Nashville Railroad Company, Appellant in said Court of Appeals, indicates the following as the portions of the Record in this action to be incorporated into the Transcript of Record on said Writ of Error, to-wit:

To be copied from the Record on the first appeal known on the second appeal as the "Old Record," on the pages as shown below:

1. The preamble on page 1.
2. The plaintiff's original petition, on pages 1 to 4, inclusive.
3. The plaintiff's first amended petition, and the order filing same, on page 5.
4. The order showing defendant's motion to require plaintiff to elect whether she would proceed under the Tennessee law or under the Federal statute, on page 6.
5. The order noting the filing of defendant's motion to strike out certain portions of the petition, on page 6.
6. And said motion to strike, on page 7.
7. The order sustaining defendant's motion to strike, pages 7 & 8.

459 8. Defendant's demurrer to the petition, pages 8 to 10.
9. Order overruling said demurrer, page 10.
10. Order sustaining defendant's motion to make the petition more specific, on page 11, and said motion on the same page.
11. Order of November 11, 1911, sustaining said motion.
12. Plaintiff's amended petition, page 13, and the order filing same, page 12.
13. Plaintiff's third amended petition, on page 14, and the order filing same, on pages 14 and 15.
14. Order April 5, 1912, sustaining defendant's motion to make the petition more specific, page 15.
15. Defendant's motion to strike from the petition, on page 16.
16. Order overruling said motion, page 17.
17. Order overruling defendant's motion to strike from plaintiff's amended petition No. 3; and filing and overruling defendant's general demurrer to plaintiff's petition as amended; and filing defendant's answer, over plaintiff's objection pages 17 and 18.
18. (Defendant's general demurrer to plaintiff's petition as amended, page 18.
19. Defendant's motion to strike from plaintiff's amended petition No. 3, page 19.

20. Defendant's answer, pages 19 to 21.

21. Plaintiff's reply, pages 23 and 24.

22. Defendant's amended answer, tendered to conform to the proof, pages 42 to 44, and the order of April 10, 1912, overruling defendant's motion to file same, and showing defendant's exception to said action of the court, page 25.

460 22½. The opinion reversing judgment on first appeal 156 Ky. 550, and the response to petitions for modification, etc. 157 Ky. 642; to be copied from the Record on the second appeal, known as the "New Record," on pages hereinafter set out.

23. The preamble on page 1.

24. Order reinstating case upon docket of Warren circuit court, and filing the mandate of the Court of Appeals of Kentucky reversing the judgment on the first appeal, pages 1 and 2.

25. Order tendering and filing defendant's amended answer, pages 2 and 3.

26. Defendant's amended answer, page 3.

27. Plaintiff's reply thereto, page 4.

28. Order filing defendant's exceptions to plaintiff's depositions, and order of trial, page 5.

29. Order May 27, 1914, page 6.

30. Verdict and judgment, pages 6 and 7.

31. Defendant's motion for new trial and order filing same, pages 9 to 12, inclusive.

32. Order overruling defendant's motion for new trial, pages 12, 13.

33. Order tendering defendant's Bill of Exceptions, pages 13, 14.

34. Order approving defendant's Bill of Exceptions and the Stenographer's Transcript of Evidence, page 14.

35. Defendant's Bill of Exceptions, pages 15 to 22, inclusive.

36. Supersedeas bond given by defendant on its appeal from the judgment of the Warren circuit court to the Kentucky Court of Appeals, and of the power of attorney of the surety authorizing the execution of said bond, pages 25 to 27, inclusive.

461 37. Order of Clerk of Warren Circuit Court, issuing supersedeas, page 28.

38. The Stenographer's Transcript of Evidence on the second appeal, which was approved by McKenzie Moss, Judge of the Warren circuit court the 2nd day of November, 1914, and which was filed in this court December 8, 1914, and the exhibits referred to in and made a part of the record by said Transcript of Evidence, and which were filed as a part of the record upon the appeal from the judgment of the Warren circuit court of May 28, 1914, to the Court of Appeals of Kentucky.

39. The Judgment of affirmance and the opinion of the Court of Appeals of Kentucky, March 26, 1915 (163 Ky. 823).

40. The mandate of the Court of Appeals, dated April 30, 1915, entering final judgment in conformity with the opinion of March 26, 1915 (163 Ky. 823).

41. The Petition for Writ of Error; the Writ of Error and allow-

ance of same; the Assignment of Errors, the Writ of Error Bond; the Citation, and return of service of same; and this Præcipe, and the return of service of same.

JAMES C. SIMS,
JOHN B. RODES,
HENRY L. STONE,
BENJAMIN D. WARFIELD,
Counsel for the Above-named Appellant and Plaintiff in Error.

Executed at 9:30 o'clock A. M. April 23, 1915, by delivering to B. F. Proctor, attorney of record of and for the appellee, Jeanette Stewart, admrx. of the estate of Wm. H. Stewart, deceased, a true and correct copy of the above præcipe.

Witness my hand this April 23, 1915.

JOHN C. RAY,
Sheriff of Warren County, Ky.

Filed Apr. 30, 1915. Robt. L. Greene, C. C. A.

462 On the 4th day of May, 1915, the Appellee and Defendant in Error by her counsel filed in the office of the Clerk of the Court of Appeals her Præcipe, which is in words and figures following, to-wit:

463 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JEANETTE STEWART, Administratrix of the Estate of W. H. Stewart, Deceased, Appellee.

Præcipe of Appellee, now Defendant in Error.

This Appellee, now Defendant in error, Jeanette Stewart, Administratrix of W. H. Stewart, deceased, comes by her Attorneys B. F. Procter and Wright & McElroy and asks and directs as provided by Rule 8 of the Supreme Court of the United States, that in addition to the parts of the record filed in the cause named in the caption, in the Court of Appeals of Kentucky, ordered copied in the præcipe of appellant, that the following portions of what is termed the "old record," that is the record used on the first appeal, be incorporated into the transcript on the Writ of Error, to-wit:

1. Order empaneling Jury and ordering testimony reported by official stenographer pages 24 and 25.
2. Verdict and judgment thereon, page 26.
3. Motion and Grounds for a New Trial, Pages 27, 28, 29, 30.
4. Order overruling motion for New Trial, granting appeal and extending time to file bill of exceptions, Pages 33, 34.
5. Order tendering bill of exceptions and Transcript, Page 34.
6. Order filing said transcript and Bill of Exceptions, Page 35.

7. The bill of exceptions, Pages 35 to 45.

464 8. Transcript of the evidence reported by the official stenographer on the first trial and filed on the first appeal in this cause, filed November 8, 1912, with preamble and certificate of stenographer and Circuit Judge, including index.

9. Order appointing Appellee, Jeanette Stewart, Administratrix of W. H. Stewart, deceased, Pages 69, 70.

10. Supersedeas bond and Power of Attorney, Old Record, Pages 100 to 104.

11. Supersedeas, page 104.

12. Certificate of O. A. Roup, page 105.

13. Rule VII of the Court of Appeals of Kentucky, requiring that record of former appeal be placed with the new appeal, if not copied into the transcript.

14. Pages 1, 2, 3, of the Supplemental Brief filed May 27, 1913, for Appellee in the old record.

15. Page 2 of the reply to said supplemental Brief for Appellee except the two last lines, the quotation ending with the "cause of Appellee." Said brief was filed May 7, 1913.

16. The opinion of the Court of Appeals of Kentucky, reversing the judgment on the first trial in said cause and ordering a new trial, reported in Kentucky Reports, 156 Ky. 550.

17. The modified opinion of said court in said cause, 157 Ky. 642.

18. The 1, 2, 3, Pages of Appellee's petition for rehearing filed on the first appeal in said cause, February 3, 1914, and the first five lines on the fourth page, then omitting the remainder of the 4th page, and the 5th page which discusses the depositions offered and rejected, and include the conclusion on Page 6 and the summary and authorities except the third subdivision which discusses the rejected depositions.

465 19. Plaintiff's Motion and grounds for New Trial, New Record on Second Appeal, page 8.

20. Plaintiff's bill of exceptions and order filing same, new record, second appeal, Pages 23, 24, 25.

21. This præcipe and return of service or acceptance, Petition for writ of error and Cross Appeal, Writ of Error with citation and return, bond on writ of error, assignment of errors on Cross-Appeal.

B. F. PROCTER,
WRIGHT & McELROY,
Counsel for Appellee and Defendant in Error.

The undersigned as counsel for plaintiff in error in the cause of the L. & N. R. R. Company vs. Jeanette Stewart's Adm'r'x of the estate of W. H. Stewart, deceased, accept service of the foregoing præcipe and acknowledge delivery of a copy of same.

This May 1, 1915.

SIMS & RODES.

466 And afterwards on the 5th day of May, 1915, the Appellee and Defendant in Error by her counsel filed in the Clerk's

office of said Court of Appeals the following Supplemental Præcipe, which is in words and figures, following, to-wit:

467 In the Court of Appeals of Kentucky.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JEANETTE STEWART, Administratrix of W. H. Stewart, Deceased, Appellee.

Supplemental Præcipe for Appellee.

Pursuant to Rule 8 of the Supreme Court of the United States and because of an objection by counsel for Appellant,

1. That the matters and things indicated in subdivisions 13, 14, 15 and 18 of the Præcipe of Appellee heretofore filed are not a part of either the first or second appeal in this cause, and objecting to copying same, this is therefore to ask a copy of the indorsement on the record by the Clerk in the office of the said Court of Appeals as follows:

"1914, Dec. 8, Old Record of same style placed with this appeal," and if there is a further order to the same effect copy same as part of the record.

2. Counsel for Appellant also object that subdivision 16 of the præcipe for Appellee asks to have the opinion reversing the judgment in the lower court, and also the opinion modifying that opinion copied when both are embraced in the præcipe of Appellant, this being true, omit said copying, but refer to them as embraced in the transcript ordered by Appellee citing page where they are found in copy made for Appellant. Do likewise with any other part of the record embraced in the præcipe of Appellant, and also in that of Appellee. To this extent and no further is the præcipe of Appellee changed.

B. F. PROCTER AND
WRIGHT & MCELROY,
468 *Counsel for Appellee.*

Filed May 3, 1915. Robt. L. Greene, C. C. A.

Received a copy of the foregoing Præcipe and service acknowledged this May 4th, 1915.

SIMS & RODES,
Of Counsel for Appellant.

469 Kentucky Court of Appeals, Spring Term, 25th Day of May, 1915.

L. & N. R. R. Co.
vs.
STEWART'S ADMR-.

Warren.

Came the appellant by counsel and moved the court to be permitted to withdraw the original exhibits herein, to-wit "Three photographs, two railroad time-tables and enginemen's report of running and delay time" for use on an appeal of this case to the Supreme Court of the United States, which motion being heard is sustained and leave is given to withdraw said exhibits for the purposes of said appeal.

470 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the record as directed to be copied by the Præcipe of the Plaintiff in Error and the Præcipe and supplemental Præcipe of the Defendant in Error filed in the case of Louisville and Nashville Railroad Company, Plaintiff in Error, and appellant, against William H. Stewart's administrator-, Defendant in Error and appellee, as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, on this the 25th, day of May, A. D. 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this transcript, $118.50.

Endorsed on cover: File No. 24,757. Kentucky Court of Appeals. Term No. 485. Louisville & Nashville Railroad Company, plaintiff in error, vs. Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased. Filed June 1st, 1915. File No. 24,757.

2

TRANSCRIPT OF RECORD ON CROSS-WRIT OF ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MARCH 16, 1916.

(26,187)

(25,187)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 22, 1916.

1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky at the Capitol, at Frankfort, Ky., on the 11th Day of March, 1911.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant (Now Defendant in Error),
vs.
JEANETTE STEWART, Administratrix of the Estate of Wm. H. Stewart, Deceased, Appellee (Now Plaintiff in Error).

Appeal from Warren Circuit Court.

Be it Remembered, that heretofore, to-wit, on the 11th day of March, 1916, the Appellee now plaintiff is error by her attorney, filed in the office of the Clerk of the Court of Appeals of Kentucky the following præcipe, and which is in words and figures as follows:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Appellee.

2 *Præcipe of Said Appellee, Now Plaintiff in Error.*

To the Honorable Clerk of said Court:

Please make a transcript of the record in the above entitled matter, containing the following documents, records and proceedings, and no others:

(1) Assignment of errors of Jeanette Stewart, Administratrix of the estate of William H. Stewart, deceased.

(2) Petition of said Jeanette Stewart, Administratrix of the estate of William H. Stewart, deceased for cross writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky, with evidence of the allowance thereof;

(3) The writ of error as allowed;

(4) Bond of said Jeanette Stewart, administratrix, of the estate of William H. Stewart, deceased, as approved.

(5) Citation and return of service of same.

(6) This præcipe and evidence of service on same.

Very respectfully,

B. F. PROCTOR,
WRIGHT & McELROY AND
GEORGE H. LAMAR,
Counsel for Jeanette Stewart, Adm'x of the Estate of Wm. H. Stewart, Dec'd, Plaintiff in Error.

We, James C. Sims and John B. Rodes, partners as Sims & Rodes, counsel for Louisville & Nashville Railroad Company defendant in error hereby acknowledge service of the foregoing præcipe
3 and of the delivery of a copy of same to us. This 8th day of March, 1916.

JAMES C. SIMS,
JNO. B. RODES,
Partners as Sims & Rodes.

Endorsed: Filed March 11, 1916. R. W. Keenon, C. C. A.

And then on the same day of said term, to-wit the following Assignment of Errors were filed herein.

In the Supreme Court of the United States.

JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Plaintiff in Error,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Assignment of Errors.

Now comes this plaintiff in Error, Jeanette Stewart, administratrix of William H. Stewart, deceased, by Benjamin F. Proctor, Wright and McEllory and George H. Lamar, her attorneys, and says that in the record, proceedings, decisions and judgments, including the final judgment of the Court of Appeals of the Commonwealth of Kentucky, in this cause, which was brought and prosecuted under the Employers' Liability Act of Congress of April 22, 1908,
4 there is manifest error to the prejudice of this plaintiff in error and those she represents in this, to-wit;

First. That said Court of Appeals of Kentucky erred in its judgment of March 26, 1915, in so far as the same rendered final to its prior judgment of February 27, 1914, reversing the judgment of the trial court of April 11, 1912, in favor of this plaintiff in error for $20,000.00 and costs and remanded the cause for a new trial and for further proceedings consistent with the opinion of December 19, 1913, and the modified opinion of February 27, 1914, of said Court of Appeals of Kentucky.

Second. That said Court of Appeals of Kentucky erred in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912, for $20,000.00 and costs.

Third. That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for $20,000.00 based upon the verdict of a jury rendered without the defendant in said action asking the trial to instruct the jury to apportion the damages, erred in

proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said Act of Congress and that it was the duty of the trial Court to instruct the jury to apportion the recovery between the beneficiaries; whereas said Act of Congress has been construed directly to the contrary of the Supreme Court of the United States in a similar case, Central Vermont Railway
5 Company vs. White's administratrix, decided June 21, 1915.

Fourth. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000.00 and costs, erred in holding that instructions numbered 1 and 3, as voluntarily given by the trial Court, were erroneous because the same "might authorize the jury to consider mental anguish, and loss of companionship and so on," to-wit:

"Instruction No. 1. The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause him to fall against the cab of the engine and injure him, and that he died as the natural and proximate result of said negligence if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to-wit: $35,000.

* * * * * * *

"Instruction No. 3. The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money."

And said court further erred in its said opinion of December 19, 1915, in commenting upon said instructions as follows:

"The correct measure of damages in such cases has been so often pointed out by this court that it would seem unnecessary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, loss of companionship and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. * * * Instruction No. 3 is erroneous for the same reason as instructions No. 1; it should have been in substance that the measure of recovery is such
6 sum as will compensate his estate for the destruction of his power to earn money, and that the jury may, in arriving at this amount consider all the evidence in the case bearing upon this question."

Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or

to submit proposed instructions upon that phase of the case; the said voluntary instructions of the trial Court numbered 1 and 3 were not prejudicial to the defendant but, as given were more favorable to the defendant than to the plaintiff; taken together, they affirmatively convey the idea of financial support for the defendants, as contradistinguishes from other forms of damages; and said instructions do not even suggest, what the Court of Appeals in its said opinion practically excludes the right to have the jury find in damages the loss to each child "of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation;" and

Whereas said Court of Appeals of Kentucky itself, in its subsequent opinion of February 27, 1914, in "Response to Petition for Modification and Rehearing," said:

"Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this Court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal Statute.

Upon a new trial the measure of damages will be given under the Federal Statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. R'y vs. Dwyer's Adm'x 157 Ky. 590.

To the extent indicated the opinion is modified."

Fifth. That the said Court of Appeals of Kentucky in reversing said judgment for $20,000.00 and costs, erred in holding that
7 Instruction No. 4, as voluntar-y given by the trial court, was erroneous: to-wit:

"Instructions No. 4. The Court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any complained of in the petition, then to the amount of such negligence, if any attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them if any at all, under these instructions."

Whereas the defendant in said trial Court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit to said trial Court any proposed instruction upon that phase of the case; and, although said instruction was conformable to the Federal Statute and could not be prejudicial to the defendant in said action, yet, by reason of the lack of evidence of negligence on the part of decedent, the voluntary submission by the Court of an instruction suggesting possible negligence on his part necessarily tended, is anything toward the prejudice of the plaintiff in said action, this plaintiff in error, and not to the prejudice of the defendant in said action.

Sixth. That said Court of Appeals of Kentucky especially erred in finding in its opinion that Hill the flagman was not negligent

under the proof in applying the emergency brake and that he did the only thing which he could reasonably have done, and holding that in another trial of the case the second instruction which deals alone with the negligence of Hill should be eliminated if the evidence is the same, for the reason, that the evidence showed that Hill was guilty of gross negligence in that he should have been
8 near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake, and that instruction No. 2 was properly given. Said instruction is as follows:

"Instruction No. 2. The court instructs the jury that under the rules of defendant's Company, it was the duty of the flagman O. L. Hill to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff."

Seventh. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000 and costs, erred in holding that there was any reversible error in the trial Court at the first trial in which said judgment for $20,000 and costs was rendered.

For the foregoing prejudicial errors, and each of them affecting the merits of this cause this plaintiff in error prays a reversal of the judgments setting aside and supplanting said original judgment of April 11, 1912, for $20,000 and costs; that the same may be reversed, annulled and held for naught, and that such action may be taken by this Honorable Court as may be requisite and necessary to cause said judgment for $20,000 and costs to be reinstated and rendered final in favor of this plaintiff in error.

JEANETTE STEWART,
Administratrix of the Estate of
William H. Stewart, Deceased,
By B. F. PROCTOR,
WRIGHT & McELROY AND
GEORGE H. LAMAR,
Her Attorneys.

9 We, Sims & Rodes, James C. Sims and John B. Rodes counsel for defendant in error Louisville & Nashville Railroad Company hereby accept service of the foregoing assignment of errors by receiving a copy of same at 4.30 o'clock P. M. this day.

Given under our hands this the 10 day of March, 1916.

SIMS & RODES,
JAMES C. SIMS,
JNO. B. RODES,
Attorneys for Defendant in Error, L. & N. R. R. Co.

Endorsed: March 11th, 1916, filed. Rodman W. Keenon, Clerk, C. A.

And then on the same day the following cross writ of error was filed herein.

UNITED STATES OF AMERICA, *ss:*

Commonwealth of Kentucky to the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Jeanette Stewart, administratrix of the estate of William H. Stewart, deceased, respectfully shows that she is aggrieved by the final judgment of the Court of Appeals of Kentucky of March 26, 1915, rendering final the prior judgment of said Court of Appeals February 27, 1914, adverse to petitioner and which reversed the judgment of April 11, 1912, of the Warren Circuit
10 Court in favor of petitioner for twenty thousand ($20,000) dollars and costs and remanded for new trial and further proceedings consistent with the opinion and modified opinion of said Court of Appeals, rendered respectively December 19, 1913, and February 27, 1914, all in a certain action brought by petitioner in the Warren Circuit Court against the Louisville and Nashville Railroad Company as defendant under authority of the Act of Congress entitled, "An Act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and based upon rights acquired under said Act of Congress for losses sustained by the dependent widow and three minor children of the said William H. Stewart, who died September 27, 1908, as the result of an injury sustained by him on September 5, 1908, while an employee of the said Louisville and Nashville Railroad Company and engaged in interstate traffic and commerce and which injury and death were caused through the negligence of said common carrier; and in which cause, after said judgment for twenty thousand ($20,000) dollars and costs had been duly rendered in favor of the plaintiff, your petitioner, upon a unanimous verdict duly rendered by a jury of twelve men, the said defendant, Louisville and Nashville Railroad Company, appealed therefrom to the Court of Appeals of Kentucky, with the result, aforesaid, that said Court of Appeals did so construe said federal statute adversely to this petitioner as that, by its order and judgment of February 27, 1914, said judgment in favor of petitioner for twenty thousand ($20,000) dollars and costs was reversed and the cause remanded as aforesaid and, ultimately, said judgment was made or became final and re-
11 viewable by said subsequent judgment of the Court of Appeals of Kentucky of March 26, 1915; and by which said final judgment the Court of Appeals of Kentucky did deny the second appeal of said Louisville and Nashville Railroad Company by affirming with costs and ten per cent damages the judgment of the Warren Circuit Court of May 28, 1914, for eleven thousand eight hundred and eighty-five ($11,885) dollars entered in favor of petitioner upon the unanimous verdict of a jury of twelve men at the

second trial had pursuant to the aforesaid action of the Court of Appeals of Kentucky, the jury in said verdict apportioning the aggregate amount thereof between the widow and three infant children of said decedent; and by which said final judgment of the Court of Appeals, rendering final its said judgment of reversal of February 27, 1914, the Court of Appeals in effect substituted said second judgment for eleven thousand eight hundred and eighty five ($11,885) dollars with damages, interest and costs for the said first judgment in favor of petitioner for twenty thousand ($20,000) dollars and such damages, interest and costs which should have accrued thereon,—as all of which will appear from the record of the proceedings in said cause.

And your petitioner further shows that the Court of Appeals of Kentucky is the highest Court in said State in which a decision in said cause could be had; and that in said order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner involving federal questions subject to review by the Supreme Court of the United States, as all of which will more in detail appear from the assign-

12 ment of errors, which is filed with this petition.

And your petition- further shows that said Louisville and Nashville Railroad Company has heretofore prayed a writ of error from the Supreme Court of the United States to said Court of Appeals of Kentucky, and the same was allowed by the Chief Justice of said Court of Appeals of Kentucky on the 30th day of April, 1915.

Wherefore your petitioner prays that a cross writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of by your petitioner and that a transcript of the record appropriate for said cross writ of error, duly authenticated, may be sent to the Supreme Court of the United States.

B. F. PROCTOR,
WRIGHT & McELROY, AND
GEORGE H. LAMAR,
Counsel for Jeanette Stewart, Administratrix of Wm. H. Stewart, De'd.

The cross-writ of error as prayed for in the foregoing petition, is hereby allowed this 11 day of March, 1916, and the penalty of the bond for costs if fixed at the sum of One Thousand Dollars.

Done at Frankfort, Kentucky, this 11 day of March, 1916.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

To the allowance of the aforesaid cross writ of error the

13 Louisville & Nashville Railroad objects and excepts, this March 11, 1916.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

And then on the same day of said term, to-wit the following writ of error was filed herein.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Louisville and Nashville Railroad Company appellant and Jeanette Stewart as Administrator of the estate of William H. Stewart deceased, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their
14 validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity espeially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Jeanette Stewart administratrix of the estate of William H. Stewart, deceased, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein, given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Ken-
15 tucky on the 11th day of March in the Year of our Lord one thousand nine hundred and sixteen.

[SEAL.] J. W. MENZIES,
Clerk of the District Court of the United States in and for the Eastern District of Kentucky,
By M. S. BARRETT,
Deputy Clerk.

Allowed by
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

And then on the said day, the following Bond was filed herein to-wit:

Know all men by these presents, that we, Jeanette Stewart Administratrix of the estate of William H. Stewart, deceased, as principal, and National Surety Company, as sureties, are held and firmly bound unto the Louisville and Nashville Railroad Company a corporation, in the full and just sum of One Thousand ($1000.00) dollars, to be paid to the said Louisville and Nashville Railroad Company, a corporation, its successors, attorneys or assignees, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, 1916,
16 in the year of our Lord one thousand nine hundred and sixteen.

Whereas, the Court of Appeals of Kentucky in a suit depending in said Court, between the Louisville and Nashville Railroad Company as appellant and the said Jeanette Stewart administratrix of William H. Stewart, deceased, as appellee a judgment was rendered against the said Jeanette Stewart administratrix of William Stewart, deceased, and the said Jeanette Stewart administratrix of William H. Stewart, deceased, having obtained writ or error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said Court in the aforesaid suit, and a citation directed to the said Louisville and Nashville Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Jeanette Stewart administratrix of the estate of William H. Stewart, deceased, shall prosecute her writ of error to effect, and answer all costs if she shall fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

NATIONAL SURETY COMPANY,
[SEAL.] By R. W. KEENON, *Attorney-in-Fact.*

Sealed and delivered in presence of
RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Approved by
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

March 11, 1916.

17 Endorsed: 1916, March 11th, filed. R. W. Keenon, C. C. A.

And then on the same day of said term, the following Citation was filed herein, to-wit:

UNITED STATES OF AMERICA, *ss:*

In the Court of Appeals of Kentucky.

JEANETTE STEWART, Administratrix of the Estate of William H. Stewart, Deceased, Plaintiff in Error,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant in Error.

To Louisville and Nashville Railroad Company, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein Jeanette Stewart, administratrix of the estate of William H. Stewart, deceased, is plaintiff in error and the said Louisville and Nashville Railroad Company is defendant in error, to show cause, if any there be, why the judgments rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf,

18 Witness, the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of Kentucky, this 11th day of March in the year of our Lord one thousand nine*teen* hundred and sixteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Copy of the above citation received and service accepted, this 11th day of March, 1916.

B. D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

Endorsed: 1916, March 11th, filed. Rodman W. Keenon, C. C. A.

Court of Appeals of Kentucky.

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky do hereby certify that the foregoing is a true and correct copy of the Præcipe and evidence of service of same, Assignment of Errors, Petition for Cross Writ of Error, Writ of Error as allowed, Bond of Jeanette Stewart as Administratrix, and Citation, showing return of service of same filed, by Jeanette Stewart, Administratrix of the etate of Wm. H. Stewart, deceased, plaintiff in error, on petition for cross writ of error, against the Louisville and Nashville Railroad Company, on record of appeal, in the case of Louisville and Nash-

19 ville Railroad Company, plaintiff in error, against Jeanette Stewart, Administratrix of the estate of Wm. H. Stewart, deceased defendant in error, now pending in the Supreme Court of the United States, all of which is now certified and transmitted to the Supreme Court of the United States.

In testimony whereof, witness my hand and seal as Clerk of the Court of Appeals of the Commonwealth of Kentucky this March 15th, 1915.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

Endorsed on cover: File No. 25,187. Kentucky Court of Appeals. Term No. 904. Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, plaintiff in error, vs. Louisville & Nashville Railroad Company. Filed March 18th, 1916. File No. 25,187.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

March 7, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

This is a writ of error from this court to the Court of Appeals of Kentucky, to review its judgment which affirmed the judgment of the Circuit Court of Warren County, Ky. (Printed Record, pp. 218-222, 163 Ky. 823), awarding Defendant in Error (hereinafter styled plaintiff) eleven thousand eight hundred eighty-five dollars ($11,885.00) damages, apportioned to plaintiff, as widow, and to her three children (Printed Record, p. 114) for the death of plaintiff's husband, William H. Stewart, which is claimed to have resulted September 27, 1908, from injuries he received, while a locomotive engineer in the employment of Plaintiff in Error (hereinafter

styled defendant) at Cumberland City, Tenn., on September 5, 1908.

There were two trials of this case before juries in the Circuit Court of Warren County, Ky., resulting on both trials in verdicts and judgments for plaintiff; and two appeals therefrom by defendant to the Court of Appeals of Kentucky, on the first of which the judgment of the Warren Circuit Court was reversed, and the case remanded to that court for a new trial conformably to the opinion of the Court of Appeals of Kentucky (Printed Record, pp. 104-109, 156 Ky. 550, 157 Ky. 642); and on the second the judgment of the Warren Circuit Court in favor of plaintiff was affirmed (Printed Record, pp. 218-222, 163 Ky. 823). It is to the last judgment of said Court of Appeals of Kentucky that this writ of error is directed.

The record in this case is not as voluminous as it looks, so far as it is necessary for this court to consider the record on this writ of error. We call attention to the fact that by the cross-praecipe of plaintiff "portions of the record unnecessary to a proper presentation of the case have been incorporated into the transcript" (Printed Record, pp. 233, 234), contrary to the last literary paragraph of subdivision 1 of Rule 8 of this court; whereas all necessary parts of the record were called for by defendant's praecipe (Printed Record, 231-233). We refer particularly to the transcript of evidence on the first trial (Printed Record, pp. 29 to 100, inclusive), as a part of the record in the lower court which it was unnecessary to bring to this court.

STATEMENT.

The northbound freight train, from Paris, Tenn., to Bowling Green, Ky., composed of from 32 to 34 cars, of which Stewart was engineer, when it reached Cumberland City, met a southbound freight train, and also southbound passenger train No. 103. The railroad was single track and it was necessary for Stewart's train to take the siding there to let the two southbound trains by Stewart's train, together with several box cars which were already standing on the siding, and which were coupled to and shoved ahead of Stewart's engine when it entered upon the siding, and which extra cars plus Stewart's train were longer than that track. Therefore, in order to let the southbound freight train, which then stood waiting on the main track just north of the south switch of the siding, proceed, it was necessary for Stewart's train to be moved, together with the cars ahead of the engine, sufficiently far north on the siding to enable the rear of Stewart's train to clear the south switch, where the siding entered the main track. In order to do this, it was necessary according to the conductor's testimony, for Stewart's engine and the cars ahead of it to foul the main track at the north switch of the siding, *i. e.*, either to occupy the main track or to be so close to it as that it would not clear the southbound passenger train which was then about due at Cumberland City. Therefore, after the southbound freight train had departed, and in order that Stewart's train and the box cars ahead of it might be in the clear of the main track at the north switch, the con-

ductor, Jones, signaled the engineer, Stewart, to back the train. While doing so, and when the train had only moved a short distance, less than two car lengths, flagman Hill, who was at the rear of the train, seeing that if it continued to back, it would not only foul the main track at the south end of the switch, but would also split that switch, which was set and locked for the main track, thereby not only damaging the switch, but probably derailing the caboose, and delaying all traffic, and not having time to run to the switch and open it to enable the backing train to pass on to the main track, applied the air brakes by the use of the angle cock or stop cock on the rear end of the caboose, thereby stopping the train suddenly, and causing a jar to be felt in the engine. Stewart then had his head out of the engine window, and it is claimed that the jar occasioned by the application of the air brakes caused his head and shoulder to strike against the side of his engine cab, and to produce the injuries which resulted in his death 22 days later.

We shall discuss the evidence as to these transactions more in detail in connection with the argument of our second and third assignments of error.

ASSIGNMENTS OF ERROR.

The errors upon which defendant relies for a reversal of the judgment of the Court of Appeals of Kentucky, as shown by defendant's Assignments of Error (Printed Record, pp. 225-228) are these:

"First. The said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the War-

ren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,-885.00), together with costs, interest and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error.

"Second. The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Warren Circuit Court, and in not remanding said cause to said Warren Circuit Court for a new trial.

"Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the Plaintiff in Error, to find a verdict in favor of the Plaintiff in Error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the Plaintiff in Error.

"Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, Instruction No. 4, as follows:

" 'No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attribu-

table to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Said Instruction No. 4, to the giving of which to the jury Plaintiff in Error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages 'to the amount of' the employe's negligence, instead of, as required by Section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe.

"Fifth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the said Warren Circuit Court, and in holding that said court had committed no error, in giving to the jury, on the court's own motion, and over Plaintiff in Error's objection* and exception, Instruction No. 5, reading as follows:

" 'No. 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman, O. L. Hill, stopped said train by the use of the air valve in the rear of the

*There is a clerical misprision, made either in copying the transcript of record for this court, or in printing the record, because the original Assignment of Error is correct, whereby it is recited that the instruction was given over **plaintiff's** objection; whereas it was given over **defendant's** objection, as the record otherwise shows. See defendant's bill of exceptions, Printed Record, 121, showing that defendant objected to the seven instructions given by the court on its own motion, including Instruction No. 5.

caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.'

"Said Instruction No. 5 being erroneous because of the qualifying clause contained at the end of said instruction, reading as follows:

" 'Unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff,'

as there was no evidence of negligence of any of Plaintiff in Error's agents or servants other than conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake; and was also erroneous in directing the jury positively and without qualification to 'find for plaintiff' (Defendant in Error) if the necessity for the appli-

cation of the emergency air brake had been brought about by defendant's (Plaintiff in Error's) agents or servants in the negligent operation of the train; the qualification, which the trial court directed the jury would justify a verdict for the plaintiff (Defendant in Error) being obscure and misleading.

"Sixth. The Court of Appeals of Kentucky erred in sustaining and approving the action of the trial court in giving to the jury, on the court's own motion, and over the objection and exception of the Plaintiff in Error, Instruction No. 7, reading as follows:

" 'No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict.'

"And said Court of Appeals of Kentucky also erred in sustaining and approving the action of the trial court in refusing to give to the jury Instruction C offered by defendant, Plaintiff in Error here, and which instruction reads as follows:

" 'C. The court instructs the jury that if they should find against defendant, all of the jury must agree to said verdict.'

"And to which said action of said trial court in refusing to give said Instruction C, Plaintiff in Error excepted at the time.

"Said Instruction No. 7 was erroneous, and the refusal to give said Instruction C was erroneous, in that thereby the jury was authorized to find a verdict by only nine, or ten, or eleven of the twelve jurors in violation of the Seventh Amendment of the Constitution of the United

States, a limitation upon Congress in enacting the Act of Congress known as the Federal Employers' Liability Act of April 22, 1908, upon which said Act this cause of action is founded, and a limitation upon every court and tribunal which entertains for trial causes of action, such as this one, arising under the said Act of Congress, this being a suit at common law where the value in controversy exceeds twenty dollars, and in which, by the said Seventh Amendment, right of trial by jury shall be preserved.

"Said Court of Appeals of Kentucky further erred in its construction of said Seventh Amendment of the Constitution of the United States, as applied to this cause, as shown by the opinion of Hannah, J., filed in said Court of Appeals of Kentucky for the said court, March 26, 1915 (163 Ky. 823), as follows:

" '3. It is also contended by appellant that the court erred in giving to the jury an instruction authorizing nine or more of the jury to return a verdict, and in refusing to give to the jury an instruction requested by appellant, requiring that the jury should all agree to a verdict; it being contended by appellant that in trials in the State courts of cases controlled by the Federal Employers' Liability Act, there must be a unanimous verdict of twelve men, as required by the Seventh Amendment to the Constitution of the United States; and that Congress had not power to grant jurisdiction to try causes of action created by it, upon State courts not so constituted as to satisfy the guarantee of the Seventh Amendment as to jury trials. And it is further contended by appellant

that Congress, by the Act of April 5, 1910, amending the Federal Employers' Liability Act, did not grant jurisdiction to State courts not so constituted as to satisfy the Seventh Amendment, to try causes of action under the Act mentioned.

" 'Since the filing of the appellant's brief herein, this court has considered the above-mentioned contentions and decided them adversely to appellant's claim. Ches. & Ohio R'y Co. v. Kelly's Admx., 161 Ky. 655; L. & N. R. R. Co. v. Johnson's Admr., 161 Ky. 824.' "

ARGUMENT.

1. Defendant's first assignment of error, that "**the said Court of Appeals of Kentucky erred in entering judgment affirming the judgment of the Warren Circuit Court of Kentucky for the sum of eleven thousand eight hundred and eighty-five dollars ($11,885.00), together with costs, interest, and 10% damages, entered in error in favor of said Defendant in Error and against said Plaintiff in Error,**" challenges the right of the Court of Appeals of Kentucky to affirm the judgment in this case with damages and interest, in that there is no provision in the Federal Employers' Liability Act authorizing the allowance of interest and damages in addition to compensation for loss of pecuniary benefits. "We may not piece out this Act of Congress by resorting to the local statutes of the state of procedure or that of the injury." (Michigan Central Railroad Co. v. Vreeland, 227 U. S. 59, 66.) "If the Federal statute was applicable, the

State statute was excluded by reason of the supremacy of the former under the National Constitution." (Second Employers' Liability Cases, 223 U. S. 1-53; Michigan Central Railroad Co. v. Vreeland, *supra;* St. L. & S. F. R. Co. v. Seale, 229 U. S. 156, 158; see also, Winfield v. Railroad Co., 216 N. Y. 284.)

The Federal Employers' Liability Act may not be supplemented by State law so as to authorize damages and interest such as is authorized by the law of the State in which the case is tried. This was ruled in Norton v. Erie Railroad Co. (Supreme Court of New York, Appellate Division), 148 N. Y. Supp. 771, the opinion in which reads as follows:

"The plaintiff seeks to have included in the judgment, interest upon the verdict from the time of the death of the plaintiff's intestate, as is provided by Section 1904 of the Code of Civil Procedure. I think that section has no application to this case, for the reason that the action is brought under the Federal Employers' Liability Act, and the verdict rests solely upon the claim arising under that act. The Federal statute is paramount and exclusive (Act, April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp., 1911, p. 1322) as amended by Act, April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp., 1911, p. 1325); Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Taylor v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. ——, reversing 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D, 276), and the defendant's liability may not be extended by the provisions of our

statute. No provision is made in the Federal Act for adding such interest to the verdict, and I think the provisions of our statute may not be invoked for that purpose."

Accordingly, an order denying plaintiff's motion for a retaxation of costs was affirmed.

Following the Norton case the Supreme Court of Onondaga County, New York, in an opinion delivered January 22, 1916, in Mabel L. Griffin, Admx., v. N. Y. C. & H. R. R. Co., denied a motion to restore to the bill of costs originally filed an item of $1,125.00, representing interest on the verdict, under the Federal Employers' Liability Act, from the date of its rendition.

Therefore, if the judgment of the Court of Appeals of Kentucky should be affirmed in other respects, we ask that so much of said judgment as awards plaintiff interest on the verdict from the date of its rendition, and 10% damages on the supersedeas bond on affirmance, be reversed.

2. Defendant's second assignment of error is amplified and made more specific in its third assignment of error, and we will argue the two assignments together under the heading of the third assignment, to-wit:

"**Third. The said Court of Appeals of Kentucky erred in approving the refusal of said Warren Circuit Court to direct the jury, on the motion made in that behalf by the Plaintiff in Error, to find a verdict in favor of the Plaintiff in Error, on the ground that the evidence was insufficient to justify the submission of the case to the jury for its consideration; and said Court of Appeals of**

Kentucky erred in not reversing the judgment of said Warren Circuit Court for its refusal to direct the jury to find a verdict in favor of the Plaintiff in Error.''

(*a*) Under the Kentucky practice where, in the opinion of the defendant, the plaintiff fails to sustain the averments of actionable negligence alleged in the petition by competent proof, defendant moves the court to give to the jury a peremptory instruction to find for defendant. And this motion was made by defendant on the trial of this case in the Warren Circuit Court, both at the conclusion of plaintiff's testimony, and again at the conclusion of all the testimony (Bill of Exceptions, Printed Record, p. 119). But both motions were overruled, and this action of the trial court was approved by the Court of Appeals of Kentucky (Printed Record, p. 221). There is no evidence that Stewart was injured as a result of the negligence of the defendant, and a peremptory instruction to find in its favor should have been given. And this is a Federal question. St. L., I. M. & S. R'y Co. v. McWhirter, 229 U. S. 265; Seaboard Air Line R'y Co. v. Padgett, 236 U. S. 668; Seaboard Air Line R'y Co. v. Moore, 228 U. S. 434; Central Vermont R'y Co. v. White, 238 U. S. 507; Atlantic Coast Line R. R. Co. v. Burnette, 239 U. S. 199; North Carolina R. Co. v. Zachary, Admr. of Burgess, 232 U. S. 248; Seaboard Air Line R'y Co. v. Duvall, 225 U. S. 477; St. L., I. M. & S. R'y Co. v. Taylor, Admx., 210 U. S. 281.

In the McWhirter case, *supra* (229 U. S. 265), the question was as to whether or not there was a proximate connection in law between McWhirter's working over-

time, contrary to the Hours of Service Act, and his being run over by an engine after the time limit expired. The Kentucky courts held for the administrator. But this court reversed the judgment on the ground that "there was no proof tending to show a connection between the permitting of the working beyond the statutory time, and the happening of the accident. * * * Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

And, in speaking of its jurisdiction to review this question, the court said: "While it is true, as we have said, that coming from a State Court the power to review is controlled by Rev. Stat. 709 (identical with Judicial Code, 237), yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law." (Citing cases.)

In the White case, *supra* (238 U. S. 507), the question was as to whether the burden of proof rule of the *lex fori* as to contributory negligence applied or that of the Federal courts, in an action under the Federal Act in the State courts of Vermont. This court held that the Federal rule applied, saying: "Congress in passing

the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these (before cited) and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R'y v. Moore, 228 U. S. 434."

(*b*) Having established that this is a Federal question, it now devolves upon us to show to the court, if we can, that the question should be decided in our favor.

DEFENDANT WAS NOT NEGLIGENT ON THE OCCASION COMPLAINED OF, AND THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT AUTHORIZE A RECOVERY EXCEPT FOR NEGLIGENCE.

The Federal Employers' Liability Act made no change in the substantive law of negligence. Actionable negligence for which the master is liable must be proved since, just as before, the Act.

As was said in Seaboard Air Line R'y v. Horton, 233 U. S. 492, 501: "It was the intention of Congress to base the action *upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence* (our italics). The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and

appliances of the work may be safe for the workmen (citing cases). To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been any doubt before as to the common-law rule, certainly the act now limits the responsibilty of the company as indicated."

It is settled, that in an action by a servant to recover damages for injuries while in the master's employment, there is no presumption that the master was negligent. The doctrine *res ipsa loquitur* is not applicable. (Patton v. T. & P. R'y Co., 179 U. S. 658; T. & P. R'y Co. v. Barrett, 166 U. S. 617; Seaboard Air Line Railway Co. v. Moore, 228 U. S. 433; Northern Pacific R'y Co. v. Dixon, 139 Federal, 737; Midland Valley R. Co. v. Fulgham, 181 Federal, 91; Montbriand v. Chicago, St. P., M. & O. R'y Co., 191 Federal, 988.)

In the case at bar the alleged cause of the accident is that flagman Hill applied the air brake and stopped the train, as a result of which Stewart, the engineer, struck his head and shoulder against some part of his engine cab and was injured. In other words, it is asserted that Hill's act was the proximate cause of the accident. If his act was not negligence, in that he could not reasonably have anticipated that the injury to Stewart would follow as a result of the application of the air brake, then plaintiff's case falls to the ground.

The use by common carriers engaged in interstate commerce of air brakes on trains, is required by acts of Congress (U. S. Compiled Stat., 1901, Vol. 3, p. 3174; Act of March 2, 1903, 32 Stat., 943, c. 976). These acts were upheld in Johnson v. Southern Pacific R'y Co., 196 U. S. 1, and in subsequent cases. The evidence shows that, as required by said statutes, Stewart's train was equipped with air brakes, so arranged as that the engineer could apply the brakes and make an emergency stop of the train from the engine, or the conductor or brakeman could do the same thing by applying the angle cock that was in the caboose, or the stop cock at the rear of the caboose, or between any two cars in the train (Printed Record, pp. 145, 152, 160, 177, 71, 72); and that a rule of defendant provided that such application of the air should not be made "unless it is to avoid injury to life or property." (Printed Record, pp. 145, 161.)

The evidence further shows that the application of the stop cock by flagman Hill was in strict accordance with the rule, inasmuch as if he had not done so, the caboose would have run through and split the switch, thereby not only injuring it and delaying all traffic, but also, in all probability, some of the cars would have been derailed. (Printed Record, pp. 68, 151, 152, 178.)

The evidence also shows that the use of the emergency brakes for the purposes mentioned in defendant's rule was of frequent occurrence (Printed Record, pp. 63, 68, 70, 160, 161, 162), and that the ordinary effect of the application of the air brakes in emergency was not calculated to injure persons on the train or do any other

damage, and did not produce any more of a jerk to the train than is frequently felt in starting and stopping long freight trains, or while they are in motion (Printed Record, pp. 69, 140, 155).

Manifestly, Congress, in enacting the Safety Appliance Acts, *supra,* did not intend to require the doing of a vain or useless thing. If trains were to be required to be equipped with air brakes, Congress evidently further intended that they should be used by the trainmen in order to subserve the purpose which Congress had in mind in enacting the statutes. Certainly, Congress could not have intended to require railroads to use air brakes, and yet require that they should be used only at the carriers' peril.

If, then, as we contend, the air brake was a proper appliance to use to stop the train to prevent it from splitting the switch, damaging property and delaying all traffic, and it was then used with the same effect that always attends its use, it follows that such use did not constitute actionable negligence. Stewart, as a part of his contract of employment, assumed the risks incident to the service, including the risk of being thrown against his engine cab by the application of the air brakes from the rear of the train, as was done, just as the conductor and flagman would have done if Stewart had applied the air from the engine and had thereby jerked the caboose and injured the conductor or flagman if they had been in the caboose.

The language which we have quoted from the Horton opinion, *supra,* applies equally with respect to the al-

leged negligence of a fellow-servant, as it does to defects and insufficiencies in equipment, for the opinion says, "But, plainly, with respect to the latter as well as the former (negligence of other employes) ground of liability, it was the intention of Congress to base the action upon negligence only." The Horton case also held, as applicable to the question of Stewart's assumption of risk of being injured in the manner it is claimed he was injured: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly indicates the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." See, also, Southern R'y Co. v. Crockett, 234 U. S. 725, 730.

Having stated the propositions which we conceive the evidence tends to support, as affecting the question as to whether or not it was negligence as to Stewart for Hill to apply the stop cock, we will now, with some particularity, consider the evidence of conductor Jones, fireman Sorrells, flagman Hill, and brakeman Minor, who, with Stewart, constituted the train crew (and which four first-named persons are the only witnesses to the accident), as it pertains to the propriety of Hill's applying the stop cock; as to the effect of his so doing; and as to how this effect compared with that of applying the emergency brake on other occasions.

Before quoting from the record the evidence of the witnesses applicable to the propositions above stated, and in order that the court may more readily apply our argument, we think it advisable to refer to the salient

points of the two opinions of the Court of Appeals of Kentucky touching the evidence, and to point out the respects in which we conceive that court was in error in holding that the evidence sufficed to take the case to the jury, as well as to show that the opinion on the second appeal, to which this writ of error is prosecuted, not only can not be reconciled with the opinion on the first appeal, but plainly violates the rule that the opinion on the former appeal is the law of the case on subsequent appeals, to which rule that court is firmly committed. (Stewart's Admr. v. L. & N. R. Co., 136 Ky. 717; Western Union Tel. Co. v. Sutton, 140 Ky. 729; Goff v. Lowe, 141 Ky. 799.) Though this latter is probably a State, not a Federal, question.

In the opinion on the first appeal, the Court of Appeals of Kentucky, after fully and accurately stating the testimony with respect to Hill's applying the angle cock and stopping the train, held in accordance with our contention that there was no evidence which justified the submission of the case to the jury on that issue, saying: "It is urgently insisted for appellant that it was entitled to a peremptory instruction. We have given above the substance of the evidence, and must say that so far as the evidence shows any negligence upon the part of Hill, the rear flagman, appellant's contention should have been sustained." (Printed Record, p. 107.)

Conductor Jones did not testify on the first trial. All of defendant's crew of that train who testified at both trials were put on the witness stand by plaintiff. She did not introduce Jones as a witness on the first trial,

but did introduce him on the second trial. In the absence of Jones' testimony on the first trial, the Court of Appeals of Kentucky, as its opinion shows, conceived the opinion from the testimony of other witnesses that Jones was probably negligent in signaling the train to back when he knew, or should have known, that the switch at the south end of the siding was locked, and that Hill was not there to unlock it, and held that on another trial, if there was testimony to sustain that issue, the case should go to the jury thereon.

Our contention is that the view the Court of Appeals took of the question as to whether or not Hill was negligent, in the first opinion, was the law of the case on the second appeal; that there was no substantial difference in the testimony on the two trials as to the alleged negligence of Hill, and that the court also erred, on the second appeal, in holding there was evidence that Jones was negligent, sufficient to authorize the submission of that question to the jury. It is the Federal question as to whether or not the evidence on the second trial was sufficient to justify the submission of the case to the jury for its consideration that we are asking this court, in this division of our brief, to review, and upon which we ask this court to hold that the Warren Circuit Court erred in submitting the case to the jury, and that the Court of Appeals of Kentucky erred in approving such action of the trial court.

In discussing the evidence we refer to that given upon the second trial, to which this writ of error is directed (Printed Record, pp. 127-217), unless otherwise specified.

The figures in parentheses, not otherwise explained, refer to the pages in the printed record on which the evidence quoted or referred to in the brief may be found.

H. T. Jones, conductor of the train of which Stewart was engineer, testified that he signaled Stewart to back the train on the occasion when Hill applied the angle cock and arrested the backward movement. Stewart's head was out of the window on the right side of the engine, and he was looking at Jones. It was Stewart's duty to move the train in obedience to Jones' signals. Jones was asked what effect Hill's application of the air had, and replied that it stopped the train suddenly with "a sort of jerking effect." Jones did not know what effect this had on Stewart; did not see him thrown against the side of the cab. Jones said the siding held from 32 to 34 cars, and that he had 33 or 34 cars in his train, not counting the cars, the number of which he did not recall, that were standing on the side track, and which were coupled to and shoved ahead of Stewart's engine, while his train was on the siding, and which extra cars must be taken into account in making a computation as to whether or not it was possible for Stewart's train to have been in the clear at both ends of the siding. (The opinion on the second appeal is clearly in error in saying that the record does not conclusively establish that it was not and in intimating that all of Stewart's train, including the extra cars, "could have all been placed on the passing track, clearing the main line at the north end, and without the rear end extending past the south switch" (Printed Record, p. 220, at bottom of page). Jones said that the train

was backed possibly a car length or a car length and a half, at a speed of two or three miles an hour, before Hill stopped it. Jones could not say that the cars at the north end of the siding were then in sufficiently far to clear the main track. He was then asked (145): "Q. Now, what is the usual and customary way of applying that emergency, by whom is it ordinarily done? A. The emergency is applied ordinarily by the first person who sees danger and gets to the valve. If the engineer sees it first, he will apply it first. If the engineer does not see the danger, and it is observed from the rear of the train, then the flagman or conductor will apply it." Jones was asked if such was the usual procedure, and replied that the application of the emergency brake was an unusual procedure.

On cross-examination, Jones testified that in order to get the train on the side track into the clear of the main track at the south end, the rear of the train would have to be from 120 to 130 feet from the frog, and it is 50 feet further to the switch point (150). Of course, the same is true as to the north end of the switch. In other words, on every side track there are from 240 to 260 feet at the two ends where the track joins the main track that can not be occupied by cars on the siding without fouling the main track. The siding at Cumberland City is on the left, or north, side of the main track, and the station is between the side track and Cumberland River. There are three wagon and foot crossings over the side track. Jones testified that it was not his purpose, in signaling the train to back, that it should leave the siding and en-

ter the main track at the south end. Therefore, Hill, in stopping the train when it was about to foul the main track, was facilitating Jones' purpose. The caboose would have fouled the main track without even entering upon the switch at all, as heretofore explained (151): "Q. If the caboose had run upon the switch, it might have split the switch points, mightn't it? A. It would split them. Q. You had no purpose to permit that to occur? A. No, sir. * * * Q. What would be the possible or probable effect? A. It would split the switch and probably derail the car. Q. Would it damage or injure property? A. Yes, sir." Jones was then asked as to the effect upon the train of Hill's applying the air in emergency: "Q. State whether or not there are such jars usual and incident to and customary to the operation of such freight trains on that road? A. Practically every day."

W. C. Minor, head brakeman, who was sent out ahead of Stewart's engine to flag passenger train 103, testified that he saw Jones give Stewart the back-up signal and heard him answer it with three short blasts of the whistle; the train started back and was stopped by the emergency air brakes, applied from the rear of the train, but Minor did not see Hill apply the brakes, nor see him immediately before that time. "Q. What effect did it have on the train when he applied the air? A. Stopped the train at once. Q. What sort of jar or jerk did it put on the train? A. Well, it would put a jar on there as quickly as any emergency application. * * * Q. What effect did it have on the engine and those cars there, tell

how much it was, how much jar was there, I mean the train and the engine? A. It would be a jar equal to any emergency application of the brakes. * * * I don't know how to describe it. It is just a sudden stop, all the brakes were turned on and set in emergency and that made an immediate stop. Q. Well, does that cause a heavy jar in the train? A. Well, I should think so, to a certain extent." The train was not in the clear at the north end when it started to back. There were several cars on the siding ahead of the engine. Minor said that Stewart was a delicate man, given to complaining of his ill health and to taking medicine (156, 159, 161, 162): "Q. Was it usual and customary to apply the air brakes and put the train in emergency from the rear of the train? A. Not ordinarily; no, sir. Q. How is that ordinarily done, if it becomes necessary to set them in emergency? A. From the conductor's valve in the caboose. Q. Was that usually done by the conductor or the engineer? A. It would not be done by the engineer, for he would not know for what purpose they were using this emergency; it had to be done by the conductor. Q. I am talking about how it is done, isn't it a fact that it is usually applied by the engineer? A. It has been done by the engineer, but in a case of emergency from the train crew, it is done by the conductor in the caboose. Q. Then it is proper for a man to apply it from the rear? A. Yes, sir." Minor then testified that he could not say how many times he had applied the emergency, but that he had done it a time or two. On his cross-examination, Minor said the emergency was applied frequently (161);

that the reason he went out to flag 103 was because the main track was fouled at one end (160): "Q. I believe you told Mr. Proctor that there was a jerk or jar when it came to a sudden stop? A. Yes, sir; the same as any emergency application of the brakes. Q. Moving fast or slow? A. Slowly, I don't know how fast. Q. Did you see the jerk or jar of the train when it stopped? A. Yes, sir. Q. As an experienced railroad man, state whether or not in the operation of freight trains there are not naturally a lot of jerks and jars that can not be avoided, and which occur at any and all times in the operation of such trips (trains)? A. Yes, sir. Q. Said jerks and jars, are they or not usual and customary in the operation of such trains? A. Yes, sir. Q. Tell the jury whether or not this jar was like or similar to such other customary and ordinary jars in the operation of freight trains? A. I should think so, any emergency application of the brakes would be the same as this. Q. In stopping a freight train are there any jerks and jars? A. More or less; yes, sir. Q. In pulling it out are there any jerks or jars? A. Yes, sir. Q. In going down a swag, or fill, or a dip, are there any jerks or jars? A. Yes, sir. Q. In going into a dip as they go together there is a jerk and in going down the descent there would be another jerk of the slack running out of the train? A. Yes, sir. * * * Q. State how frequent you meet with such jars as you saw on that occasion in the operation of freight trains? A. That is very frequently that jars come like that, especially in any kind of trouble like that. Q. Does that happen frequently or otherwise?

A. It would happen frequently, you might say, in any kind of trouble when you would want to stop at any time. Q. State whether or not such jerks and jars as you saw on that occasion happen and occur almost daily in the operation of such freight trains? A. Yes, sir; I see it frequently (160, 161)." Minor explained that the latter sentence in defendant's rule governing the application of air brakes only applied to the engineer and was inapplicable where the air was applied from the train (161; also Sorrells, 170).

On redirect-examination, Minor testified (162): "Q. Now, do you tell Mr. Rodes, and do you mean to tell this jury that you see that emergency application applied daily on the trains? A. No, sir; not daily, but I said frequently. Q. Do you mean that it is frequently applied by the men in the ordinary business of the road? A. No, sir; I didn't say ordinary business, I said frequently in case of trouble? Q. You mean that it is applied somewhere on the road, but on no particular train? A. No sir; no particular train, but some train might use it. * * * Q. On the L. & N. road? A. That is what I mean. It might be applied in any case where it was necessary." Minor said he could not tell how many times he had applied the emergency brake.

T. A. Sorrells, fireman, testified that from his position on the engine he could not see Stewart when the emergency brakes were applied; did not know what his position then was; and did not see what, if any, effect the application of the brakes had on Stewart, but heard him say that he was thrown against the cab (164): "Q. What

effect did it have on the train? A. Just stopped the train. Q. What did you do? A. I didn't do anything. * * * Q. What happened to you when this train was put in emergency there? A. I was standing on the deck and I got overbalanced and caught against the tank. Q. What caused you to get overbalanced? A. The sudden stop of the train. Q. What was it you caught against? A. The tank. Q. What did you do then? A. Didn't do anything. Q. What did Stewart do? A. I don't know what he did, I didn't see him."

Sorrells testified that in a subsequent conversation with Stewart, the latter said he hit his head against the cab; "I went around there and asked him what was the matter and what was the brakeman trying to do, and he said he was trying to kill somebody he supposed." (Defendant's objection overruled; exception.) Sorrells said there were 6 or 8, or maybe more, cars ahead of the engine (165); that Stewart was in bad health. "I never had seen him well (166)." Sorrells did not see Hill.

On cross-examination, Sorrells said that he had seen Stewart taking medicine prior to the occasion complained of; had made several trips as fireman with Stewart; "He was a delicate man." It is uncontradicted in the evidence that Stewart continued to work regularly as engineer fro. September 5th, when the accident happened, until September 20th. He died September 27th. Sorrells testified that he continued on to Bowling Green with Stewart the day of the occurrence at Cumberland City, and made several other trips with him after that. Then this (167): "Q. After that trip did you ever hear

him make any complaint about that Cumberland City matter, or mention it? A. He never mentioned it to me at all after the day he was hurt." Sorrells identified a number of trip cards signed by Stewart, and showing trips that he made between the date of the accident and his death, on all of which trips, except two, Sorrells was Stewart's fireman, and during none of which did he hear Stewart complain (168, 169): "Q. Shortly before September 5, 1908, were you and Stewart in any wreck or derailment? A. Yes, sir, once. Q. Where? A. At McKinnon. Q. When was that? A. August 22, 1908. Q. Were you and Stewart both on the engine? A. Yes, sir. Q. What happened to the engine, and if he got any jar, what kind of a jar did he receive? A. We run over a derailer and got the engine and front trucks on the ground and ties. Q. Before getting off the track did it bump on the ends of the ties? A. Yes, sir. Q. Did the engine turn over? A. No, sir, the engine never turned over. Q. State whether or not as a railroad man under these circumstances, the engineer received any severe jerks or jars? A. He would get pretty good jars running over ties with the engine. Q. How about when it was derailed or thrown off the track? A. Oh, it was a pretty heavy jar when we run over that derailer and hit on the ties."

The testimony last quoted, taken in connection with that as to Stewart's illness in the preceding spring (Dr. Stone, 205), and as to his general bad health, as testified to by Minor and Sorrells, certainly raises a question as to whether the accident at Cumberland City, rather than

the accident at McKinnon and Stewart's general bad health, caused his death. Sorrells further testified (169): "Q. In the operation of all freight trains are there any jerks and jars necessarily incident to the operation of freight trains? A. Frequently we have jars in running through dips and the slack will run back. Q. In your judgment to give a measure of it, in a train of about 30 cars, about how much slack would there be? A. Something near a car length. Q. In the taking up of slack in the stopping of trains are there any jerks or jars? A. Possibly there would be. Q. Would the cars bump together? A. Yes, sir. Q. In going down dips, what kind of jars? A. The rear end will run up and hit the front end of the train and when you go out of the dip the slack will run out and cause a jerk. Q. In the operation of a train by the engineer, the engineer can make what is called a service application of the air brake can he not? A. Yes, sir. Q. State whether or not there sometimes occurs what is called a quick action triple in making service applications? A. They will go into emergency sometimes, it is frequently the case. Q. I will get you to state whether or not a jerk or jar of the train as it occurred there at Cumberland City was such as was usual and incidental and customary in the ordinary operation of freight trains? A. Well, sometimes we have jerks. * * * Q. In this instance was this jar hard or soft? A. Well, it was about a medium jar I suppose * * *."

On redirect-examination, Sorrells was asked if the emergency stop is not "recognized as a dangerous stop?" "A. They use that to keep from killing people and de-

stroying property. Q. And they are the circumstances under which it is justifiable to use it? A. That is what it is used for." (Recross-examination): "Q. You say it is used to prevent destruction to property or life either one? A. Yes, sir. Q. And that emergency can be applied either by the engineer or by the flagman in the rear? A. Yes, sir. * * * Q. Are there not many stops of the freight train that jerk and jar the train crew when there is no emergency application of the air brakes? A. Yes, sir."

O. L. Hill, flagman, who opened the stop cock and applied the air brakes on the train, testified that after his train headed in the side track he closed the switch back to the main track, thereby permitting the southbound freight train to pass out, and left the switch set for the main track. Then Hill's train began backing up and he stopped it by applying the angle cock at the rear end of the caboose (173): "Q. For what purpose did you apply that angle cock? A. So I could get to the switch in case he wanted to back out and throw the switch before he ran through it. I wanted to stop him before he ran through the switch. Q. You didn't know whether he wanted to back out or not? A I presumed he did by him backing up. * * * Q. Where were you when he began to back? A. Somewhere between the crossing at the south end of the side track and the middle crossing * * * about half way between the two crossings. * * * Q. How far was the caboose from the switch staff when it stopped? A. It was about half way over the crossing, I don't know how many feet.

* * * Q. When that train started backing, how far did it back before you applied the emergency? A. Possibly a car length or a car and a half. Q. Was the caboose north or south of you at the time it started backing? A. Bound to have been south of me. Q. Why? A. I was at the north crossing. Q. How far were you from the end of the caboose? A. Possibly three car lengths. Q. When it started backing what did you do? A. I gave them the stop signal. Q. Then what else did you do? A. Continued giving stop signals. Q. How many stop signals did you give? A. I don't know, until I saw he was not going to stop. Q. Then what did you do? A. I went and stopped him myself. Q. You didn't know for what purpose he was moving, you say? A. No, sir. Q. What speed was he going when you put the train in emergency? A. That would be hard to say. Q. Was he going exceeding a mile and a half an hour? A. Something like that, nor over that I shouldn't think. Q. Was that switch set for the main then? A. Yes, sir. Q. And what was your object you say in stopping that train? A. To prevent him running through the switch. Q. What else? A. That is what I say, and to keep in the clear for 103 was due at that time. Q. That was coming from the north wasn't it? A. Yes, sir. Q. You knew the north main was foul didn't you? A. No, sir. * * * Q. How many cars were on the siding when you got there? A. I didn't know, I found out afterwards. Q. You didn't know anything about the condition of the train at all? A. Not at the head end, no, sir; my duties are at the rear end. * * * Q. Do they ever

use the emergency to bunch the slack in a train? A. Yes, sir. Q. Is that often done or otherwise? A. Very frequently done. * * * Q. Now were you trying to bunch the slack on this occasion? A. Yes, sir, principally that. Q. And for what other purpose, if any? A. To prevent him from slacking out further than he did. Q. In other words you just wanted to stop him? A. Yes, sir, to keep him from backing out before I could get to the switch. * * * Q. Isn't it dangerous to life and to property to apply that emergency stop? A. I don't know that it is dangerous to life, it is dangerous to property sometimes, it very frequently pulls out drawheads. * * * Q. Mr. Hill I am requested to ask you if you didn't know at the time you applied that emergency, that the north end of your train still fouled the main? A. No, sir, I did not know it."

On cross-examination, Hill testified that he was then a conductor; that before and including the day of the accident, Stewart had complained of his health; had been taking medicine; and was delicate looking; that after the southbound freight train had gone he had started from the switch up to the second crossing "To open this crossing to allow traffic to cross," which was witness' duty under defendant's rules (177): "Q. As you were going there was any movement of the train made? A. I suppose I had got half way between the two crossings and they began backing up. * * * Q. What became of you then as he started back? A. I looked ahead and looked back trying to figure out what they were doing and I gave them stop signals. Q. How far was the

caboose from that switch at that time? A. I would not be positive in feet. Q. How about its relation to the first crossing? A. They were about a half car length north of that crossing when they started backing up. * * * Q. About where did that caboose get out of the clear, or was it out of the clear? Where did it have to be to be in the clear? A. It had to be just north of this crossing to be in the clear, the caboose if it blocks the south crossing at Cumberland City it is out of the clear, and that is the first crossing after you enter the switch along about that livery stable. Q. And as it went back the caboose got out of the clear then? A. Yes, sir." The crossing is about 100 feet from the switch. "Q. Now you say you gave the signal? A. Yes, sir, the stop signal. Q. Did you give it more than once? A. Yes, sir, two or three times. Q. Which way were you going? A. Running towards the rear end. * * * Running on the main. Q. Was your stop signal obeyed? A. No, sir. Q. When you saw it was not obeyed, what did you do? A. I used the angle cock to stop him. Q. If that caboose had continued further and run out further what would have happened? A. Run out and split the switch, derailed a car, and possibly damaged the caboose and two or three cars. Q. State whether or not it was your duty to stop the train? A. Yes, sir, to save myself from suspension and also the company from loss on it." Hill was then asked why he did not get to the switch and open it so as to let the train back on to the main track, and he explained that it was because he did not have time. And we think he makes this proposition

perfectly clear. "Q. Under the rules of the company is it your duty to apply the angle cock in emergency to protect the company's property? A. Yes, sir. * * * Q. Did the stopping of that train cause any jerk or jar? A. It didn't in the rear end. Q. Is or not some jerking or jarring incident to every stop? A. Oh, yes, any freight train stop, you can't prevent that. Q. State whether or not such jerking or jarring as must have happened on that occasion was the usual and customary jerking and jarring ordinarily met with in the operation of freight trains? A. Every day of the world. Q. Under the rules of the company is there any other method of applying that angle cock except to pull it open and keep it open? A. No, sir, they never do it any other way. Q. And that is the way you applied it? A. Yes, sir."

On redirect-examination, Hill testified (179): "Q. Now you say that the emergency as it was applied that day, is applied for the purpose of stopping cars every day? A. Yes, sir, I don't guess there is hardly a day that goes by that some one don't use it that way." Hill said he did not mean to say that every crew used it every day.

On recross-examination Hill testified that at the time he applied the air at the caboose "one corner of the caboose was positively out of the clear fouling the main. (Redirect, 180): "Q. Do you mean to say that when it stopped it had fouled the south main? A. Yes, sir."

We submit that the testimony, properly construed, did not justify the statement made in the opinion of the

Court of Appeals on the second appeal (Printed Record, 221), that "there was some evidence of negligence upon the part of Hill, the rear brakeman, in acting too hastily, and in assuming that the purpose of the conductor was to back the rear end of the train over the closed south switch, or that it would be necessary to do so in order to clear the main line at the north switch." We understand it is upon these grounds that the court held that the case was properly submitted to the jury on the second trial as to Hill, although the opinion on the first trial held that it was not proper for the trial court to submit the case to the jury as to Hill (Printed Record, 107). That Hill did not act "too hastily," is established by his uncontradicted testimony that before applying the air brake he made an ineffectual attempt to signal the engineer, by giving him two or three signals to stop, which were not obeyed. It was not until Hill realized that his signals would not be obeyed, and that the backing of the train would split the switch, probably derail one or more cars and obstruct the main track, that he applied the air. This does not show either too much haste or lack of judgment. And, concerning the other ground upon which the Court of Appeals of Kentucky held that the case was properly submitted to the jury as to Hill on the second trial, notwithstanding the opinion on the first trial to the contrary, we think the court was clearly in error in concluding that if Hill had not stopped the train it would not have fouled the main track at the south switch, and yet would have been in the clear of the main track at the north switch. In fact, Hill's uncontradicted evidence is

that when he stopped the train the caboose would not then clear at the south switch a train passing on the main track.

We think it is sufficient to say of the testimony of plaintiff's witnesses, Neill, James, Phelps, Gray, Suttle and Hagan, that it is immaterial for these two reasons: (1) They had not been in railroad service for many years before they testified and were unacquainted with railroad operations as conducted at the time of the accident. (2) Defendant's printed rule as to the purposes for which the emergency air brake should be used was the best evidence of what the rule meant, and its construction was a question of law for the court, and not a question for the opinion of witnesses, to go to the jury for their determination.

The testimony on the second trial makes no reference to the question as to whether Jones could see Hill, or Hill could see Jones, when Jones signaled the train to back and when Hill signaled the train to stop and applied the angle cock. But on the first trial Hill testified (62): "Q. You don't know what they were doing at the head end, nor what signals were given at the head end? A. No, sir."

We submit that under this testimony, neither Hill nor Jones was negligent as to Stewart on the occasion complained of. In an action by the servant against the master to recover damages for personal injuries, it is not the policy of the law to magnify the rights of the servant and to minimize the rights of the master. And it is only

by magnifying the rights of the servant in this case that anything that was done by Hill or Jones on the occasion in controversy, can be expanded into actionable negligence respecting Stewart. What was then done is a matter of frequent occurrence. That it could not reasonably have been expected to result in injury to Stewart or anyone else is demonstrable from the fact that injuries to persons on trains upon which air brakes are applied in emergency are so infrequent as to be negligible. A person is only responsible in law for the consequences which may reasonably be expected to flow from his acts. Such a consequence as happened on that occasion could not reasonably have been so expected. If we may be permitted to indulge in conjecture, it seems to us the probability is that the only reason Stewart was thrown against the side of the engine cab when the air brakes were applied, if he was so thrown, was because his careless position at the moment exposed him to that result. And in this he was contributorily negligent. Sorrells' equilibrium was disturbed at the same time, but he steadied himself by putting his hand against the tank. In 99 times out of 100, or 999 times out of 1000, probably, Stewart would have protected himself by taking hold of something, just as Sorrells did.

We think we have demonstrated, and the Court of Appeals of Kentucky so held on the first appeal, that Hill was not negligent. If he was not, then, manifestly, the trial court erred in submitting the case to the jury as to the alleged negligence of Hill. And inasmuch as it is impossible to say that the jury would have found for

plaintiff at all, or that their verdict would have been the same, if the court had withdrawn the case from the jury as to Hill and had submitted it only as to Jones, it necessarily follows that the judgment was erroneous and should be reversed, even though the court should be of opinion that Jones was negligent as to Stewart on that occasion. (Seaboard Air Line R'y Co. v. Horton, 233 U. S. 492; Same v. Padgett, 236 U. S. 668.) But for the erroneous ruling of the trial court in submitting the case to the jury as to Hill, the result of the action of the jury might have been different. (North Carolina R. Co. v. Zachary, etc., 232 U. S. 248, 256.) Therefore, as we have said, even if there was evidence to submit the case to the jury as to Jones alone, inasmuch as the case was submitted not only as to him, but also as to Hill, and the other employes who were clearly not negligent at all, and since it is impossible to know how the jury would have found if the case had been submitted only as to Jones, a new trial should be granted for such error of the court.

But we also contend that the case should not have been submitted to the jury as to Jones. Even if he should not have signaled the train back until Hill had thrown the south switch for the main track, and even though this would have been negligence as to some other person if he had been injured, it was not negligence as to Stewart, because: (*a*) the risk of being injured from that cause was one which Stewart assumed in entering and remaining in defendant's service; and (*b*) the injury to Stewart was one which Jones could not reasonably

have foreseen as a consequence of his causing the train to be backed.

In St. L. & S. F. R. Co. v. Conarty, 238 U. S. 243, absence of safety appliances intended to obviate the necessity of men going between the ends of the cars, was held not actionable negligence in an action for the death of an employe in a collision between the defective car and a switch engine. No coupling was being made.

In St. L., I. M. & S. R'y Co. v. McWhirter, 229 U. S. 265, *supra,* McWhirter, a brakeman, was run over in going down over the front end of a moving locomotive to run ahead and set a switch. He had been on duty longer than the Act of Congress regulating hours of service permitted. Held: That this negligence was not the proximate cause of his injury. Mr. Chief Justice White said:

"Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to do so would but resolve the question back to the generic rule of liability as insurer, which we have previously disposed of."

In the case at bar the injury can only be ascribed to the stopping of the train by mere surmise and conjecture. Hill could not have anticipated that an emergency stop required by the rules would injure anyone. His act is not negligent unless he could reasonably expect the result. The judgment in this case depends on surmise and conjecture, not proof.

3. The defendant's next assignment of error challenges the correctness of the instruction given the jury by the trial court as to their duty to diminish the damages because of Stewart's contributory negligence. Said assignment of error reads as follows:

"Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Warren Circuit Court, as aforesaid, in giving to the jury, on said court's own motion, Instruction No. 4, as follows:

" 'No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety, and if he failed to exercise such care, and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Said Instruction No. 4, to the giving of which to the jury Plaintiff in Error objected and excepted at the time, being erroneous in that it directed the jury to diminish the damages 'to the amount of' the employe's negligence, instead of, as required by Section 3 of the Employers' Liability Act of Congress, of April 22, 1908, directing the jury to allow only a proportional amount bearing the same relation to the full amount as the negligence attributable to the employer bears to the entire negligence attributable to both the employer and the employe."

Instruction No. 4 is erroneous on the ground pointed out by this court in N. & W. R'y Co. v. Earnest, 229 U. S. 114, 121, 122, in that it directed the jury, if they found Stewart was negligent "to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions." In other words, as said in the Earnest case, *supra:* "The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. * * * Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence at-

tributable to the employe. Second Employers' Liability Cases, 223 U. S. 1, 50."

In Seaboard Air Line R'y v. Tilghman, 237 U. S. 499, in discussing an erroneous "diminution of damages" instruction, the court said: "No reference was made to the rule of proportion specified in the statute or to the occasion for contrasting the negligence of the employe with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule and its controlling force. It results that the objection to the instructions upon this subject was well taken and should have been sustained."

4. Defendant's fifth assignment is that **the trial court erred in giving to the jury, and the Court of Appeals of Kentucky erred in approving, the qualifying clause in Instruction No. 5, which is quoted in italics below:**

"No 5. The court instructs the jury that when the plaintiff's intestate entered the service of the defendant company as engineer, he assumed all the risks and hazards incident to that employment; and if the jury believe from the evidence that flagman O. L. Hill stopped said

train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train, it was necessary so to do, in order to avoid injury to property; and further believe that such stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; ***unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake had been brought about by defendant's agents and servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.***"

(a) There was no attempt to prove, and no evidence of, negligence on the part of any of defendant's servants, other than Stewart, except conductor Jones and flagman Hill, if they were negligent, which brought about the necessity for the application of the emergency air brake, and the qualification to Instruction No. 5 was erroneous for that reason, in that the jury had the right to infer that the court was of opinion that there was evidence of negligence in defendant in other respects than as affecting the conduct of Jones and Hill. The instruction violates a cardinal rule that it is always error to instruct a jury upon an issue there is no evidence to support, or to give an instruction with reference to a state of facts not in evidence.

(b) The qualification was also erroneous in directing the jury positively and without qualification to find for

plaintiff, if the necessity for the application of the emergency air brake was brought about by defendant's servants in the negligent operation of the train prior to the application of the brake; the qualification, which the trial court directed the jury would justify a verdict for plaintiff, being obscure and misleading. To what negligent operation does the language refer? Does it mean that if Jones should not have signaled the train to back when he did, that this made Hill's act negligent, whereas, otherwise, it would have been innocuous? Or, does the reference to "the negligent operation of the train prior to the application of the brake," refer to some other act, done on some other occasion? We can not tell, nor could the jury, what the language means.

(c) Furthermore, the qualification is erroneous in the use of the words "brought about by defendant's servants." This may refer to Sorrells and Minor, as well as to Jones and Hill. But there is no evidence, or attempt to prove, that either Sorrells or Minor was negligent. The language, if used at all, should have been limited to Jones and Hill.

(d) But, more especially, the qualification, if it was meant to refer to the act of Jones in signaling the train back when he did, is erroneous in assuming that there was an issue of fact for the jury to decide as to whether he was negligent as to Stewart. As we have argued in the second division of this brief, we do not think there was an issue of negligence, under the evidence, either as to Jones' signaling the train to back, or as to Hill's applying the emergency brake. The question was one of

law for the court, which it should have decided by instructing the jury to find for defendant.

(e) To make the quality of Hill's act to depend upon a preceding act of some other person, over whom he had no control, and from whom he was too far away to confer or remonstrate with him, seems to us to violate a plain principle of justice. Hill either had the right, under defendant's rule, the applicable part of which we have quoted, to angle cock the train and prevent it from running through the switch, thereby damaging the switch, delaying transportation, and, probably derailing cars, and destroying other property, or he did not have such right. And this question should not be confused with, or made dependent upon, the further question as to what some one else did, or omitted to do, prior to Hill's act.

5. Defendant's sixth, and last, assignment presents the question, argued in a separate brief for Plaintiffs' in Error in all of the cases, including this one, which were advanced to be heard with No. 321, as one case, and presented also in that case, to-wit:

The Seventh Amendment to the Constitution of the United States inheres in causes of action created by the Act of Congress known as the Employers' Liability Act, whether tried in State courts or in Federal courts, and a State Court that can not or will not afford a trial of such a cause by a jury of twelve men whose verdict is unanimous, as at common law, is not a competent court to entertain such causes of action, by virtue of the Amendment of April 5, 1910, to Section 6 of the Act of April 22,

1908; Section 28, Judicial Code, March 3, 1911; or otherwise.

As our sixth assignment shows (Printed Record, 227), defendant raised this question in the trial court by offering Instruction "C. The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict," which the court refused to give, and defendant duly excepted; and by excepting to the action of the court in giving to the jury Instruction: "No. 7. Nine of the jury may find a verdict, but if less than the entire jury agree, then those who do agree must sign the verdict." This instruction was in accordance with Carroll's Kentucky Statutes, 1915, §2268, enacted pursuant to permission conferred on the Legislature by §248, Ky. Constitution, and which statute closely follows the language of the Constitution, to-wit: "That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."*

In this case, the verdict was ostensibly the unanimous verdict of the jury (Printed Record, 113, 114). But it seems to us this is unimportant. The merely accidental circumstance that the verdict does not show that any of the jurors dissented from it can not affect the great constitutional question involved, for at least two reasons: (*a*) A circuit court in Kentucky has no jurisdiction to

*See Appendix, p. 50.

entertain a cause of action created by the Employers' Liability Act, because it can not enforce the common-law requirement as to a unanimous verdict by twelve men, nor refuse to receive a verdict rendered by more than eight of the twelve jurors, unless it is subject to some other legal objection. The fact that in a Kentucky court a verdict, apparently unanimous, *may* be obtained is not enough to give the court jurisdiction. The court must be one in which *it is not possible* that judgment can be rendered for either side, except upon a unanimous verdict. (*b*) The test of a verdict that satisfies the requirements of the Seventh Amendment, is not to be found in the fortuitous circumstance that the verdict was ostensibly unanimous, but in the instruction which the court gave to the jury on that subject. When a jury of twelve men are told by the court that nine or more of their number can make a verdict, the fact that they were so told would naturally influence those who were not in favor of the verdict to agree to it, since they could not prevent it if as many as nine jurors favored it. Those of us who are acquainted with jury practice in Kentucky since the fractional verdict statute was enacted, well know the reluctance of jurors to have it known how they stood where less than all of them agree to the verdict, and that many apparently unanimous verdicts are rendered which would not be rendered if juries were instructed in accordance with Instruction C asked by defendant in this case, that "The court instructs the jury that if they should find against defendant all of the jury must agree to said verdict."

We merely indicate, thus briefly, the state of the record in this case on this jury question, leaving the argument of the question to the other, joint, brief for all the Plaintiffs' in Error, above referred to.

For all of the reasons we have argued, we respectfully ask that the judgment of the Court of Appeals of Kentucky be reversed, annulled and held for naught.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

March 7, 1916.

APPENDIX.

Section 248, Kentucky Constitution:

"* * * The General Assembly may provide that in any or all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Section 2268, Kentucky Statutes:

"That in all trials of civil actions in the Circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel. But where a verdict is rendered by a less number than the whole jury, it shall be signed by all the jurors who agree to it."

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. [redacted]904

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased, - - - - - - - - - Defendant in Error.

Brief of Plaintiff in Error in Support of its Motion to Quash, with Costs, the Paper Purporting to be Defendant in Error's Cross-Writ of Error Herein.

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

MOTION OF PLAINTIFF IN ERROR TO QUASH CROSS-WRIT OF ERROR HEREIN, BRIEF IN SUPPORT THEREOF, AND PROOF OF SERVICE.

And now comes the Louisville & Nashville Railroad Company, plaintiff in error herein, by Benjamin D. Warfield, its attorney and counsel, and moves to quash, with costs, the paper purporting to be a cross-writ of error herein taken out by the above-named Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, upon the grounds stated in the annexed argument.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By Benjamin D. Warfield, *its Attorney.*

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

The undersigned, of counsel for defendant in error, Jeanette Stewart, as administratrix, hereby acknowledges receipt of this notice of motion, and of the brief hereto annexed. This March , 1916.

Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN SUPPORT OF ITS MOTION TO QUASH, WITH COSTS, THE PAPER PURPORTING TO BE DEFENDANT IN ERROR'S CROSS-WRIT OF ERROR HEREIN.

In support of plaintiff in error's motion to quash, with costs, the paper purporting to be a cross-writ of error herein taken out by the above-named Jeanette Stewart, as administratrix of the estate of William H. Stewart, deceased, plaintiff in error says:

RGUMENT.

1. The proposed writ of error was applied for and allowed too late.

2. The judgment which defendant in error is seeking by said writ of error to have reviewed is not a final judgment to which a writ of error will lie.

3. There is no merit in defendant in error's favor in the questions which she is thus seeking to have reviewed; and even if the Court were to take jurisdiction of such writ of error, the only order the Court would make would be an affirmance of the judgment of the Court of Appeals of Kentucky, which reversed, on the first appeal, the judgment of the Warren Circuit Court on the first trial of the cause.

Of these in their order:

I.

The judgment of the Court of Appeals of Kentucky which defendant in error, by her writ of error, is proposing to have this Court review was rendered December 19, 1913 (Printed Record, page 104), and became final February 27, 1914 (Printed Record, pages 109, 110). Defendant in error's writ of error was not applied for and allowed, over plaintiff in error's objection and exception as shown therein, by the Chief Justice of the Court of Appeals of Kentucky, until March 11, 1916, which was more than two years after the judgment became final, and it comes too late (Foster's Federal Practice, Vol. 3, Section 698, page 2456, and notes to that section).

It seems also to be too late because not prosecuted at the same term of this Court to which plaintiff in error prosecuted its writ of error, and which was the October term, 1914, since the record was filed in this Court, June 1, 1915, which was before the October term, 1914, of the Court closed, said writ of error having been allowed by

the Chief Justice of Kentucky April 30, 1915 (Printed Record, page 223). See Grigsby v. Purcell, 99 U. S. 505; United States v. Burchard, 125 U. S. 176; The S. S. Osborne, 105 U. S. 447; The Tornado, 109 U. S. 110; Hilton v. Dickson, 108 U. S. 165; holding that cross-appeals must be prosecuted like other appeals, and that the rule as to cross-writs of error is the same as is the rule as to cross-appeals.

On both of the grounds argued, we ask the Court to dismiss the cross-writ of error because allowed and filed too late.

II.

The judgment defendant in error seeks to have this Court review was not a final judgment, and, therefore, is not the subject of review by this Court. In reversing that judgment, the opinion of the Court of Appeals of Kentucky concluded with the words: "For the reasons indicated the judgment is reversed, with direction to grant appellant a new trial and for further proceedings consistent herewith."

And, as the record shows, a new trial was had in the lower court, as directed by the judgment of the Court of Appeals, and on such retrial plaintiff (defendant in error) recovered another judgment against defendant (plaintiff in error), from which the latter prosecuted its appeal to the Court of Appeals, which affirmed said second judgment (Printed Record, pages 218-222), and thereby ended the litigation so far as the courts of Kentucky were concerned. Thereupon defendant prosecuted

its writ of error from this Court to review said judgment of affirmance rendered by the Court of Appeals of Kentucky. That was a final judgment, to which the writ of error of this Court lies. But that was the only final judgment of that court to which a writ of error from this Court does lie. The action of the Court of Appeals of Kentucky in reversing the first judgment was not a final order, and this Court will not review such action of that court. (Foster's Federal Practice, *supra,* Vol. 3, Section 695, page 2421, and cases cited in notes thereto); Tracy v. Holcombe, 24 Howard, 426, where Chief Justice Taney said:

"This case has been brought here by a writ of error directed to the Supreme Court of the State of Minnesota. But, upon looking into the transcript, it appears that the judgment which it is proposed to revise is a judgment reversing the decision of the court below, and awarding a new trial. There is, therefore, no final judgment in the case, and the writ must be dismissed for want of jurisdiction in this Court."

In Brown v. Union Bank of Florida, 4 Howard, 465, the Court, speaking through Justice McLean, in sustaining a motion to dismiss the writ of error, said:

"The judgment below reversed the judgment of an inferior court, and remanded the cause to that court with instructions to award a *venire facias de novo;* it was, therefore, not a final judgment, on which only a writ of error can issue."

Pepper v. Dunlap, 5 Howard, 51; McComb v. Commissioners, 91 U. S. 1; Moore v. Robbins, 18 Wallace, 588.

In Johnson v. Keith, 117 U. S. 199, the Court sustained a motion to dismiss a writ of error "prematurely and improvidently sued out and issued," where the highest court of a State had reversed a judgment and remanded the case to the trial court for further proceedings, in conformity with the opinion, saying:

"This motion is granted. A judgment of reversal, accompanied by an order remanding the cause for a retrial, is not a final judgment for the purposes of a writ of error to this Court. Houston v. Moore, 3 Wheat. 433; Bostwick v. Brinkerhoff, 106 U. S. 4, and cases there cited."

In Mower v. Fletcher, 114 U. S. 127, in denying a motion to dismiss a writ of error on the ground that the judgment sought to be reviewed was not final, this Court said:

"The judgment in each case is that the judgment of the State District Court 'be and the same is hereby, reversed with costs, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint.'

"That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3,

and the numerous cases there cited. The judgments in these cases are of that character. The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered. This is but carrying the judgment of the Supreme Court which has been rendered into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are not final, because something yet remains to complete the litigation."

In Parcels v. Johnson, 20 Wallace, 653, in dismissing a writ of error, this Court said:

"A writ of error can only issue from this Court to the highest court of a State for a review of the final judgment or decree of that court in a suit. In other words, it is only the last judgment or the last decree which the State courts can give in a suit, until that judgment or decree is set aside or reversed, that this Court can, even in the prescribed cases, bring here for re-examination. The judgment of the Supreme Court of Missouri, brought up in this case, is one of reversal only and remanding the suit to the inferior court for further proceedings in accordance with the opinion delivered and filed. The cause was sent back, therefore, for a new trial or a new hearing. Upon such trial or hearing the inferior court can proceed

to render a new judgment, not inconsistent with the opinion, and that judgment may in its turn be taken to the Supreme Court for examination."

In Bostwick v. Brinkerhoff, 106 U. S. 3, the Court said:

"It has not always been easy to decide when decrees in equity are final within this rule, * * * *but in the common law courts the question has never been a difficult one.* (Our italics.) If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below can not be brought here on a writ of error." (Citing cases.) This is just what the reversal of the first judgment by the Court of Appeals of Kentucky in the case at bar did. And such proceedings were had, as we have seen, with the result above stated.

This rule was again declared in C. & O. R'y Co. v. McCabe, 213 U. S. 207, which was a contest between State and Federal courts as to jurisdiction over the subject-matter of the litigation. In the course of the opinion, it was said:

"The judgment under review was the only final judgment in the appellate court of the State from which the plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser* v. *Hemphill*, 198 U. S. 173, and cases therein cited."

These cases conclusively settle the proposition that the judgment of the Court of Appeals of Kentucky on the first appeal, which plaintiff is seeking to have reviewed here, was not a final judgment and is not reviewable by this Court. And her writ of error should be dismissed.

III.

But, even if the Court had jurisdiction to review on such writ of error the judgment of the Court of Appeals of Kentucky on the first appeal, the Court would not order such judgment reinstated, for the reason that it reversed a judgment which this Court would have reversed if the Kentucky court had affirmed it and defendant had brought it here on writ of error, for these reasons (in the order raised in plaintiff's writ of error):

a. The judgment of the Kentucky Court of Appeals, March 26, 1915, did not "render final its prior judgment of February 27, 1914." The latter judgment became final on February 27, 1914, and was in nowise affected by the judgment of March 26, 1915, and could not have been.

b. Said Court of Appeals did not err "in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912," for the conclusive reason that said Court of Appeals had no power or authority whatever, either on March 26, 1915, or at any time after February 27, 1914, to revise or reverse its judgment reversing the judgment of the lower court on the first trial. The Court had lost all jurisdic-

tion and control over the case so far as its said first judgment was concerned.

c. If the judgment which the Court of Appeals reversed on the first appeal was vitally erroneous in material respects, making a reversal necessary, it is wholly immaterial whether or not the trial court erred in requiring the jury to apportion the damages between the beneficiaries. If they were not entitled to that judgment at all, there is no question here as to how that void judgment should have been distributed between the beneficiaries if they had been entitled to collect it. The same is true as to plaintiff's fourth assignment of errors in Instructions No. 1 and No. 3 given on the first trial and condemned by the Court of Appeals.

d. Inasmuch as, on plaintiff's petition therefor, the Kentucky court reheard the case on the first appeal and corrected the measure of damage instruction to conform to the Federal Act instead of to the State practice, she has no ground of complaint as to her fourth assignment of error on that point. But the question is material to us: On the first trial the lower court gave the State rule —or tried to, but the Court of Appeals said it was not correct, even under State law—as to measuring damages. In the original opinion the rule was thus stated: "That sum that will compensate his estate for the destruction of his power to earn money"—a succinct statement of the Kentucky rule. But, on plaintiff's petition to rehear, the court took back that statement in its opinion, and referred to its opinion in the Dwyer case for the correct rule for measuring damages in actions brought under the Federal

Employers' Liability Act, which limits recovery to loss of pecuniary benefits of which the beneficiaries have been deprived by the death. (C. & O. R. Co. v. Dwyer's Admx., 157 Ky. 590.) Now, our point is that if there had been no other error in the first judgment of the Warren Circuit Court, it should have been reversed by the Court of Appeals because of the error in the measure of damage instruction, and, therefore, plaintiff was not deprived of any Federal right to which she was entitled by the action of the Court of Appeals in reversing a judgment secured under a measure of damage instruction which is condemned by every utterance of this Court on that subject. (M. C. R. Co. v. Vreeland, 227 U. S. 59; American R. Co. v. Didricksen, 227 U. S. 145; G. C. & St. F. R'y Co. v. McGinnis, 228 U. S. 173; St. L. & S. F. R'y Co. v. Seale, 229 U. S. 156; N. & W. R'y Co. v. Holbrook, 235 U. S. 625; Garrett v. L. & N. R. Co., 235 U. S. 308.

And, as touching the seeming reliance of counsel who drew plaintiff's writ of error, on defendant's lack of right to object, in the Court of Appeals, to erroneous instructions because defendant did not offer correct instructions in their stead, we call the court's attention to the language of the Court of Appeals in the Dwyer case, *supra,* which on a writ of error from the second judgment, of affirmance, is to be heard by this Court at the same time the case at bar is heard, where the Court answered a like objection as follows:

"It is insisted for appellee that, as appellant did not on the trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment

appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and, as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. L. & E. R'y Co. v. Crawford, 155 Ky. 723; South Cov. & C. St. R'y Co. v. Core, 29 R. 836."

The language on this point in the Crawford case was substantially the same as in the Dwyer case which we have quoted. In the Core case, also cited in the Dwyer case, the Kentucky court said:

"It is argued by counsel for appellee that as appellant's counsel did not ask an instruction on the measure of damages, it can not complain of the one given on that question, however erroneous the court may find it to be. We think this contention unsound. While Section 317, Subsection 5, Civil Code, only requires a trial judge to give instructions if asked by the parties, it has been held by this court that if, unasked, he undertakes to do so, it is his duty to see that the instructions given are correct. Furthermore, it has also been held that if an instruction

is offered by either party which is defective in form or substance, the court 'should prepare, or direct the preparation of, a proper instruction on this point.' (L. & N. R. Co. v. Harrod, 115 Ky. 877)."

And in L., H. & St. L. R'y Co. v. Roberts, 144 Ky. 820, the Court of Appeals of Kentucky held:

"It is said, however, by counsel for appellee that the appellant company can not complain of the failure of the trial court to properly instruct the jury on the subject of damages as it did not offer any instruction upon this point. The rule upon this subject has been announced in several cases, but as it appears not to be thoroughly understood by the profession, we will endeavor to restate it in simple form. (1) In civil actions the court is not obliged upon its own motion to instruct upon the whole law of the case, that is to say, if there are several issues in a case, upon all of which the parties would be entitled to have the jury instructed, and the court upon its own motion only instructs the jury as to some of the issues, the failure to instruct upon the other issues will not be available error, if the instructions given are correct, although proper exceptions may be saved to the instructions given. But if the instructions given are not correct, and proper exceptions are saved, the error may be taken advantage of upon appeal. (2) If the court undertakes upon its own motion or upon request of either of the parties to instruct the jury upon the law applicable to all the issues, or in other words to give the whole law of the case, then the court should properly instruct the

jury upon each issue that it undertakes to instruct concerning; and if an erroneous instruction is given that prejudices the substantial rights of the complaining party and proper exception is saved, it will be reversible error. (3) If instructions are offered upon any issue concerning which the jury should be instructed, but they are erroneous in form or substance, then the court should prepare or direct the preparation of a proper instruction in place of the defective ones. L. & N. R. Co. v. Harrod, 115 Ky. 877; South Covington & Cin. St. R'y Co. v. Core, 29 Ky. Law Rep. 836."

These cases are conclusive in our favor against plaintiff's proposition that we had no right to complain of the instructions which the Court of Appeals condemned on the first appeal, because we did not offer correct instructions in their stead. And this is not a Federal question, any way, but one of State practice, which this Court will not review.

e. As to Instruction 4, given on the first trial, respecting the duty of the jury to diminish the damages in proportion to decedent's contributory negligence, which plaintiff claims was correct, it is sufficient to say of it that it is the character of instruction which this Court condemned in N. & W. R'y Co. v. Earnest, 229 U. S. 114, and Seaboard Air Line R'y v. Tilghman, 237 U. S. 499, cited in our brief already filed in this Court in this cause.

f. In plaintiff's sixth assignment of error, touching the alleged error of the Court of Appeals, on the first appeal, in holding that Hill was not negligent, it is said "the evi-

dence showed that Hill was guilty of gross negligence in that he should have been near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake," etc. This statement is directly contrary to the language of defendant's Rule 117a, to which it refers (Printed Record, 73, 200). That rule says that "the employe attending the switch will, after locking it to the main track, take a position not *nearer* than 10 feet from the switch until the expected train has passed." Whereas, the assignment treats the rule as though it read "not *further away* than 10 feet." The rule fixes no distance from the switch the employe shall stand, except that he shall not stand *nearer* to it than 10 feet. He may stand as much further away from it as his good judgment and the other duties he has to perform may suggest and require. In this instance, it was proper for Hill to stand further away than 10 feet, because of the blocked crossings for which it was his duty to cut the train. And he was not standing "several hundred feet away," as the assignment asserts, but only about 100 feet away (Printed Record, 177).

Therefore, we submit that because of the fatal errors in the measure-of-damage and diminution-of-damage instructions given on the first trial of this cause, the judgment of the Court of Appeals of Kentucky could not have been other than it was. The judgment of the trial court was bound to be reversed for those errors. If it had not been, and we had brought the case here then, this Court

would have reversed the judgment for such errors, all other questions aside. So that, from whatever angle the proposition is viewed, there is no substantial or tenable ground for plaintiff to ask this Court to review the judgment of the Kentucky Court of Appeals reversing the first judgment of the trial court in this case, even if this Court had jurisdiction to review, which we have shown in the two previous divisions of this brief it has not.

On a well-settled principle, if the Court of Appeals reached the correct result in reversing the judgment on the first appeal, it is immaterial that it rested its decision on erroneous grounds instead of correct grounds. It is the result, and not the reasoning, that controls.

Hence, we respectfully ask this Honorable Court to quash the paper purporting to be defendant in error's cross-writ of error herein, with costs.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

NOTE—In view of the fact that plaintiff's writ of error was not applied for or allowed until a few days before this case is likely to be reached for argument, we have been compelled to prepare and print this brief hurriedly, and without having seen any brief for plaintiff in this case at all.

FILED
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JAMES D. MAHER
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Plaintiff in Error,

versus

JEANETTE STEWART, as Administratrix of the Estate of WILLIAM H. STEWART, Deceased, - - - - - - - Defendant in Error.

No. 904.

JEANETTE STEWART, as Administratrix of the Estate of WILLIAM H. STEWART, Deceased, - - - - - - - Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Reply Brief for the Louisville & Nashville Railroad Company.

BENJAMIN D. WARFIELD,
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Of Counsel,

April 12, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
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Defendant in Error.

No. 904.

JEANETTE STEWART, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED,
Plaintiff in Error,

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Reply Brief for the Louisville & Nashville Railroad Company.

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1. Learned counsel for plaintiff, who prepared her assignment of errors and brief in this court, is evidently unacquainted with the practice in the courts of Kentucky

under the Code of that State; and overlooks the fact that questions arising under such practice are not of a Federal character, but are merely matters of procedure, and whatever satisfies the requirements of the courts of the State in that behalf is not to be challenged elsewhere.

As the court said in Central Vermont R'y Co. v. White, 238 U. S. 507 (relied on by plaintiff on another point), in condemning multifarious assignments of error:

"Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, *to the sufficiency of exceptions*, and to various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, *can not be considered on writ of error from a State Court.* Seaboard Air Line v. Duvall, 225 U. S. 477, 486." (Our italics.)

This sufficiently disposes of the contentions made in plaintiff's brief as to the instructions having been given voluntarily by the trial judge; as to defendant's not having offered correct instructions in lieu of those which it complains were erroneous; that its exceptions to instructions given did not specify the particulars in which the instructions were erroneous; and as to the effect of the filing of defendant's amended answer to conform to the proof. As to these matters, the case was tried in conformity to the Code and practice of Kentucky, in a way to satisfy its Court of Appeals, because it considered and passed on the questions to which the exceptions related;

and being of a non-Federal character, this court will not review these questions.

That defendant's exceptions satisfied the requirements of the Kentucky practice, see L. & N. R. Co. v. McCoy, 81 Ky. 403; Meaux v. Meaux, etc., *Ib.* 475; Helfrich Saw & Planing Mill Co. v. Everly, 17 Ky. Law Reporter, 795; American Ins. Co. of N. Y. v. Austin, by, etc., 18 Ky. Law Reporter, 632; also, L., H. & St. L. R'y Co. v. Roberts, 144 Ky. 820, and cases there cited, quoted from on pages 13 to 15, inclusive, of our brief in support of motion to quash cross-writ of error.

The question presented in Illinois Central R. Co. v. Skaggs, 240 U. S. 60, on which plaintiff relies, was different from the one she argues with respect to instructions given in this case. In the Skaggs case, the question was as to the duty of the court to make the instructions more specific in the absence of request by either party to do so. Whereas, the question here is, as to whether a party has a right to complain of an erroneous instruction, given on motion of the other side or of the court, without offering a correct instruction in its place. The Roberts case, *supra,* settles this question against plaintiff.

2. Plaintiff's brief is clearly in error in asserting, in effect, that the Court of Appeals of Kentucky reversed the first judgment solely on the ground that the instructions were erroneous, and not also on the ground that the jury should have been peremptorily instructed to find for defendant for lack of evidence that it was negligent. In making this argument, plaintiff's counsel confuses two distinct things. The trial court submitted the case to the

jury specifically as to flagman Hill, but not as to conductor Jones. The court held that defendant was entitled to a peremptory instruction as to Hill, but that there was evidence which would have justified the submission of the case to the jury as to Jones. This does not mean that the court would have affirmed the judgment except for the errors in the instructions pointed out in the opinion. For, to have done so, the court clearly would have usurped the functions of a jury. It was not for the court to say, as matter of law, that defendant was liable because Jones was negligent. This was a question for a jury to decide, but which a jury had not then decided. The court made this clear in the response to the petition for modification of opinion (R., 109). Manifestly, unless, as we contend, there was no evidence that defendant was negligent to justify the submission of the case to a jury at all, both parties were entitled to have the jury pass on the question as to whether or not Jones was negligent. Therefore, the reversal of the judgment on the first appeal had a larger scope than plaintiff's counsel attribute to it. Under the Federal law (Employers' Liability Act, Sec. 3; Slocum case, *infra*) and under the law of Kentucky, if the case was to go to the jury at all, defendant was entitled to have all of the issues of fact submitted to the jury—was entitled to have the question as to whether or not Jones' negligence was the proximate cause of Stewart's injury submitted to the jury:

"The fact that appellants were given a jury trial of the most material parts of their case does not satisfy the

law which guarantees the right of trial by jury. That right is not alone that twelve laymen may pass upon some question of fact, even a vital one to the case, but that all the issues of fact—in this State the whole case, upon the law given them by the court—shall be so tried." (John King Co. v. L. & N. R. R. Co., 131 Ky. 46, 53, 114 S. W. 308.)

3. Plaintiff argues that the Kentucky Court erred in condemning the contributory negligence instruction given on the first trial, because, as is claimed, there was no evidence that Stewart was contributorily negligent, and, therefore, no instruction on contributory negligence should have been given. We think this contention is unsound. It is true, direct evidence as to what Stewart was doing at the time it is claimed he was injured, and whether or not his conduct on that occasion made him contributorily negligent, is meager. But it is not essential that there should have been direct evidence in order to raise an issue of fact for the jury on this point.

In Watkins v. City of Henderson, 168 Ky. 622, decided February 22, 1916, a case where a pedestrian was injured by a defective street, and where the trial court gave a contributory negligence instruction, and the jury found for the city, it was argued on behalf of Watkins, on his appeal, that no contributory negligence instruction should have been given for the reason that there was no evidence on which to predicate the instruction. That was the only error relied on. In rejecting this contention, the court said:

"It is of course elementary that instructions must be supported by evidence. But this does not mean that direct evidence is essential or that negligence may not be inferred from circumstances developed in the trial of the case, although there may not be any fact directly imputing it. And the jury who heard the witnesses describe the locality where the accident happened, as well as the manner in which it occurred, might have concluded that if Watkins had been exercising ordinary care for his own safety he would not have stumbled and fallen. There might of course be a case presenting facts somewhat similar to this in which an instruction on the subject of contributory negligence would be out of place, but, generally speaking, an instruction on contributory negligence in this class of cases may be rested on circumstances shown by and reasonable inferences to be drawn from the evidence, and we can not say that it was error to give such an instruction in this case."

(See page 38 of our original brief.)

The fact that Stewart assumed a position on the engine whereby he was injured by a jerk which did not injure fireman Sorrells, was a circumstance from which the jury had a right to infer that Stewart was contributorily negligent.

4. In the brief on the other side, as to what happened to fireman Sorrells when the train was angle-cocked and it is claimed Stewart was injured, it is said:

"The force of the jerk or jar was so great that the fireman was thrown from his seat on the left-hand side of the engine up against the boiler." (Page 4.)

This statement does not agree with what Sorrells himself testified. He said, on the first trial (R., 38): "I was standing just inside of the cab ringing the bell, and it overbalanced me and I fell up against the tank." And, on the second trial, he testified (R., 164): "I was standing on the deck and I got overbalanced and caught against the tank." There is a wide difference between a fireman who is sitting on his seat in an engine cab being thown therefrom by a jerk, and his being jostled against the boiler while he is standing near it in the deck of the engine, ringing the engine bell.

5. While it seems to be true, as stated by opposing counsel, that the motion and grounds for a new trial on the first trial (R., 18) did not expressly include instruction No. 4, yet the bill of exceptions (R., 26, 27), which is controlling, does show that the defendant and plaintiff both excepted to the giving of all of the seven instructions which the court gave on its own motion, including instruction No. 4. Therefore, the argument now attempted to be made that the Court of Appeals of Kentucky had no right to consider the question of contributory negligence, because instruction No. 4 was not specifically named in the motion and grounds, is captious and untenable. Furthermore, this is not a Federal question, as we have already shown.

6. It is admitted by plaintiff that the measure of damage instruction given on the first trial, which was

condemned in the opinion of the Court of Appeals on the first appeal (R., 108-109), was not a correct instruction under the Federal Act, as held by this court in the Vreeland, Didricksen, McGinnis and other cases. It was not even a correct instruction under Kentucky law, as the Court of Appeals pointed out in its original opinion (R., 108). But, it is said for the administratrix, in substance and effect, that while the instruction was improper in authorizing the jury to award damages in "such a sum as will fairly compensate his estate for his death," instead of authorizing the jury to award such damages as the evidence showed the beneficiaries to have been deprived of by reason of Stewart's death, nevertheless, the instruction was not prejudicial to defendant, for the reason that the infant children were entitled to recover for the loss of care, counsel, training and education of the deceased parent, which could not be recovered for under the State law, and that in some unexplained way the court should have assumed that a recovery under the Act, thus augmented, would about equal, if it would not exceed, the amount recoverable under the State law for the benefit of decedent's estate, and that, therefore, defendant was not prejudiced, because the measure of damage instruction was attempted to be given according to State law, rather than according to the Federal Act. This argument overlooks the fact that it is the duty of the jury to fix the damages under proper instructions, and that the court can not say that the jury's verdict would have been the same if a correct measure of damage instruction had been given, instead of one that was incorrect.

In Covington Saw Mill & Mfg. Co. v. Drexilius, etc., 120 Ky. 493, it was argued that although an instruction authorizing punitive damages in addition to compensatory damages was erroneous it was not prejudicial for the reason that the verdict was no more than could properly be sustained as compensation. But the court rejected this view, saying:

"While we might be of opinion that the verdict was no more than would compensate one for the pain endured, and the impairment of his capacity for laboring and earning money, as the result of such an injury, manifestly to do so would be to usurp in a measure the province of the jury in this respect. They may have thought otherwise, and the appellant is entitled to their verdict, and not to our judgment instead, upon this subject. If the jury should have found that a less sum was fair compensation, it would not have been within our province to have increased it. * * * At any rate appellant was entitled to have his real case tried by the jury under unobjectionable instructions as to the measure of damages."

If the argument of plaintiff on this proposition were sound, a judgment would never be reversed because of an erroneous measure of damage instruction, with the result that courts would be fixing the amount of the damages, instead of juries who are the constitutional triers of such questions. (Slocum v. N. Y. L. I. Co., 228 U. S. 364; Sec. 3, Employers Liability Act.) And it is not as though the instruction on the measure of damages on the first trial had been correct under the State law. It

was not correct either under that law or under the Federal law. And inasmuch as an incorrect instruction, as has been uniformly held, is worse than no instruction at all, it is just as though there had been no instruction given the jury on the measure of damages on the first trial of the case, the judgment on which the administratrix is asking this court to reinstate, and the jury had been left unguided by law in arriving at their verdict. If the only obstacle that stood in the way of plaintiff's right to have the first judgment reinstated was the error in the measure of damage instruction given the jury on that trial, for that error alone, we respectfully submit, plaintiff's request would have to be denied.

7. The case of Campbell v. Northwest Eckington Improvement Company, 229 U. S. 561, and the eight other cases cited in connection therewith by counsel on the other side, in an attempt to induce this court to reinstate the first verdict for $20,000, do not support the right or duty of this court to do that which the other side ask be done. Most of the cases so cited were equity cases, consisting of attachment, apportionment warrant, railroad bond issue, divorce and alimony, and other like causes, and, therefore, the judgments were rendered by the courts without juries. The right of an Appellate Court as to such cases to render judgment or to direct the judgment that should be rendered is, of course, well settled. The only personal injury cases tried to juries cited in the list are Perkins v. N. P. R'y Co., 199 Federal, 712, and Muse v. Stern, 82 Va. 33. The Perkins case is very different from this one. In the first place, that case was brought and

tried in a Federal Court and the opinion cited is that of the Circuit Court of Appeals, which reversed the judgment of the District Court. That court submitted the case to a jury, who returned a verdict in favor of plaintiff. On motion of defendant, the court entered a judgment in its favor *non obstante veredicto*, upon the view that the evidence was insufficient to support the verdict finding defendant negligent. The Circuit Court of Appeals, taking a contrary view, reversed the action of the trial court and directed it to enter judgment on the verdict of the jury in favor of plaintiff. That is a very different thing from reinstating a judgment which has been reversed by an Appellate Court, because, among other grounds, the case was submitted to the jury on a false issue on the first trial, and where, on the second trial, the jury found another verdict in favor of plaintiff, as is the case here.

In the Muse case the question was as to the liability of the owner of a phaeton to a pedestrian on the street, who was struck by the phaeton while it was driven by an employe of the owner. On the first trial there was a verdict for the plaintiff, which the trial court set aside. On the second trial there was a verdict for the defendant, the owner of the vehicle, which the trial court refused to set aside. On appeal, the injured person sought to have the first verdict that was set aside reinstated. But the Supreme Court of Appeals of Virginia refused to reinstate the first verdict, and held that plaintiff was not entitled to recover. Hence, the Muse case is entirely inapplicable here.

8. Another point attempted to be made in plaintiff's brief is that the petition for writ of error (R., 222) refers "to an alleged judgment of the Court of Appeals of April 29, 1915, as the final judgment by which it is aggrieved. No judgment of that date appears in the record." The recital in said petition was made for the reason that under Section 760, Civil Code, Kentucky, either party to an action has thirty (30) juridical days after the opinion is delivered in which to file a petition for rehearing, and the judgment does not become final until the expiration of such thirty (30) days. In the case at bar no petition for rehearing or for modification of opinion was filed, and the opinion became final April 29, 1915, as the petition for writ of error recites, and as the Chief Justice of Kentucky attests.

9. In discussing, in our original brief, the second and third assignment of errors, that the evidence was insufficient to justify the submission of the case to the jury, we briefly referred to the proposition of law that a person is only responsible for the consequences which may reasonably be expected to flow from his acts, and that such a consequence as happened to Stewart could not reasonably have been expected to flow from the act of Jones in signalling the train back, or of Hill in applying the angle-cock (Brief, p. 38). We did not cite any authority on the proposition. Upon further reflection we conclude it is probably advisable to amplify our argument on this point by the citation of authority for the convenience of the court.

In 21 Am. & Eng. Encyc. of Law, page 486, under the subheading "RULE OF CONTEMPLATION OF CONSEQUENCES," it is said:

"In the writer's view, the entire subject of negligence depends upon the question of contemplation of consequences, properly stated and applied. Loosely speaking, the rule on this subject may be stated to be that a defendant is not liable in negligence where no injurious consequences could reasonably have been contemplated as a result of the act or omission complained of, but is liable where injuries might have been anticipated or foreseen."

And in M. & St. P. R'y Co. v. Kellogg, 94 U. S. 469, the question was as to whether the railway company, which had negligently set fire to one building, was liable for the destruction of another building to which the fire was communicated from the first building. The court said:

"It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

See, also, Scheffer v. R'y Co., 105 U. S. 249.

In C., St. P., M. & O. R'y Co. v. Elliott, 55 Fed. 949, the court quoted approvingly from Hoag v. Rd. Co., 85 Pa. St. 293:

"The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer, as likely to flow from the act."

And again:

"A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it."

And again:

"The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it."

In Motey v. Pickle Marble & Granite Co., 74 Fed. 155, it was said:

"An injury that is the natural and probable consequence of acts of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable."

And again, in Addison on Torts, Section 6:

"If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the usual course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action,"

quoted approvingly in Gilson v. D. & H. Canal Co., 36 Am. St. Rep. 802, 809.

Such is also the Kentucky rule. W. G. Gosney v. L. & N. R. Co., 168 Ky. 323 (March 22, 1916), and cases there cited, including several of those hereinabove cited.

We respectfully submit that under the "RULE OF CONTEMPLATION OF CONSEQUENCES," as affecting proximate cause, Hill could not reasonably have contemplated that Stewart would be injured in the way it is claimed he was injured, as a result of Hill's angle-cocking the train; nor could Jones, as a result of his signalling the train back.

10. Under the heading, "*Crucial Error—Apportionment of Verdict,*" plaintiff argues her third assignment of error to the effect that the Court of Appeals of Kentucky erred in holding that on another trial the lower court should give the jury a measure of damage instruction requiring them to apportion the damages among the beneficiaries, instead of finding a verdict *in solido.* We do not see how this argument helps plaintiff, for at least two reasons: (a) The verdict, the judgment on which she asks to have reinstated, was not rendered under an instruction given under the Federal Act at all; but under an instruction attempted to be given under the State law, and which was not correct, even under such law. (b) It seems to us it is a misconstruction of Central Vermont R'y Co. v. White, 238 U. S. 507, 513, to argue that it is error for a trial court to instruct the jury in an action under the Federal Act to apportion the damages among the beneficiaries. What was decided in the White case,

as we read it, is that a verdict *in solido* is not erroneous where the complaining party has not asked that the jury be instructed to apportion the damages. We find nothing in the opinion justifying the claim plaintiff makes for it here, that it is error for the trial court to instruct the jury to apportion the damages. On the contrary, it seems to us that the White case holds that under the Federal Act there may be a valid verdict, either *in solido* or by apportionment, and that it is for the parties to the litigation, by timely requests, to have the court control this question in submitting the case to the jury. Furthermore, plaintiff not having embraced in the instructions she asked the court to give the jury on the last trial (R., 121, 122), an instruction requiring the jury to render a verdict *in solido,* instead of by apportionment, is precluded now, under the White case, from complaining of the action of the court in requiring the jury to apportion the verdict, even though if plaintiff had timely requested that the jury be instructed to find a verdict *in solido,* the apportioned verdict would have been erroneous.

11. On page 6 of plaintiff's brief complaint is made that defendant was permitted to file an amended answer before the second trial was begun, averring that Stewart left the administratrix $5,000 of life insurance, and that defendant was permitted to interrogate the administratrix on the witness stand on this subject. There are two answers to this complaint: (1) As affecting the pecuniary necessities of the administratrix and her children, it was competent to show what estate Stewart left them. (2) But, if otherwise, the error, if any, was not prejudi-

cial to plaintiff, for the reason that the court in its instructions did not authorize the jury to take Stewart's life insurance into consideration in arriving at their verdict, but expressly refused to do so by rejecting Instruction "D," offered by defendant (R., 121). Section 338, Kentucky Civil Code of Practice, provides: "No exception shall be regarded, unless the decision to which it relates be prejudicial to the substantial rights of the party excepting." See also Sections 134, 756, same Code; L. & N. R. Co. v. Stiles, etc., 133 Ky. 786; Slaughter v. Ditto, 108 S. W. 882.

12. Counsel for plaintiff are in error in attempting to state our position as to plaintiff's cross-writ of error. We do not claim that plaintiff should have prayed a writ of error from the judgment of the Court of Appeals of Kentucky, which became final February 27, 1914, within two years from that date. We say she has no right to prosecute a writ of error from that judgment at all, because that was not a final judgment such as this court will review.

This brief relates only to the first 33 pages, styled Part I, of the brief for the administratrix, which is the only portion of his argument with which opposing counsel has favored us down to this time. This fact will explain to the court why we make no reference to anything stated in Part II of said brief.

We respectfully ask that the cross-writ of error be quashed; or, if the court shall entertain said cause, that plaintiff's prayer that the judgment on the first appeal to the Court of Appeals of Kentucky be reinstated be de-

nied. And, on the original writ of error, we respectfully ask that the judgment of the Court of Appeals of Kentucky, on the second appeal, which affirmed the judgment of the Warren Circuit Court on the second trial, be reversed, annulled and held for naught.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Louisville & Nashville Railroad Company.

JAMES C. SIMS,
JOHN B. RODES,
Of Counsel.

April 12, 1916.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

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DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR ADMINISTRATRIX.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 485.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JEANETTE STEWART, ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, DEFENDANT IN ERROR,

No. 904.

JEANETTE STEWART, ADMINISTRATRIX OF THE ESTATE OF WILLIAM H. STEWART, DECEASED, PLAINTIFF IN ERROR,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR ADMINISTRATRIX.

The action arose under the Employers' Liability Act of 1908. On motion of the Railroad Company No. 485 has been advanced with certain other cases for hearing with No. 321 of this term on the theory that there is involved for

construction in each of these cases, as an important question, the alleged application of the Seventh Amendment of the Federal Constitution to jury trials in State courts of cases arising under this Federal statute.

By a reference to separate joint brief of counsel for defendants in error in all of these cases the court will find a discussion of the subject as actually applied to some of the cases.

This is one of the cases, however, in which it will be contended that *the disposition by this court of the main question of constitutional law is entirely immaterial so far as the above-entitled writ of error and cross-writ of error are concerned. Both trials were by juries of twelve men and both verdicts were unanimous verdicts.*

The action was filed in the Circuit Court for Warren County, Kentucky, on July 30, 1910, resulting in a judgment at the first trial of April 11, 1912, for $20,000 and costs in favor of the Administratrix of the deceased employee, the same being based upon a verdict *in solido* (R., 17). On appeal by the Railroad Company this judgment was reversed (R., 110) by the judgment of the Court of Appeals of February 27, 1914, remanding the cause for new trial and for further proceedings consistent with its opinion of December 19, 1913 (R., 104-109), and modified opinion (R., 109) of February 27, 1914. Such retrial resulted in another verdict, apportioning the damages among the beneficiaries, on which judgment was rendered May 28, 1914, for $11,885, with costs. This judgment, on appeal, was affirmed by the Court of Appeals by its final judgment of March 26, 1915 (R., 218), with costs and ten per cent damages.

The plaintiff in error in No. 485 apparently seeks to have reversed the judgment rendered at the second trial, although it refers in its petition for writ of error (R., 222) to an alleged judgment of the Court of Appeals of *April 29*,

1915, as the final judgment by which it is aggrieved. *No judgment of that date appears in the record.*

The defendant in error in No. 485, as cross-plaintiff in error in No. 904, seeks to have reinstated the judgment for $20,000 rendered at the first trial. Agreeably to the decisions of this court in C. & O. *vs.* McCabe, 213 U. S., 207, 214, and Louisiana Navigation Company *vs.* Oyster Commission, 226 U. S., 99, 102, she sued out her cross-writ of error within an appropriate time after, and with special reference to, the final judgment of March 26, 1915.

The writ of error in No. 485 was allowed April 30, 1915 (R., 223), and it was docketed in this court June 1, 1915; but the record was not printed until about February 23, after the motion of the plaintiff in error to advance was allowed February 21, 1916. Prior to that time no assignments of error or petition for a cross-writ of error had been filed by the Administratrix in the State court; but counsel resident in Washington had been employed and had appeared for her as defendant in error in 485, the record in which had been prepared in form to be used as the principal foundation for such cross-writ of error. As soon as the record was printed in No. 485, and *in less than one year from the date of final judgment* of the Court of Appeals of Kentucky, to wit, on March 11, 1916, the Administratrix filed her assignments of error and petition for cross-writ of error in the court below. The petition being allowed by the chief justice of that court, she, on the same day, gave bond and otherwise complied with the necessary preliminaries to the docketing of said cross-writ of error in this court. It was so docketed as case No. 904 on March 18, 1916, and, on the same day, the "Transcript of Record of Cross-writ of Error" was ordered printed.

The principal part of the record in the two cases being embraced in the record of No. 485, the letter "R." as used herein will apply to that record and "Transcript in No. 904" will apply to the short record bearing the last number.

For convenience the original plaintiff in the action will hereafter be referred to as the Administratrix and the original defendant in the action as the Railroad Company or the Company.

Statement.

The action was brought within the statutory period under the Federal Employers' Liability Act of 1908 by the Administratrix of William H. Stewart on her own behalf as widow and on behalf of the three minor children of her intestate, the eldest of whom was less than six years of age at the time of the death of the decedent, on September 27, 1908. The action is for the pecuniary loss suffered by these dependents by reason of the death of the decedent, as the result of an injury sustained by him on September 7, 1908, while serving in the line of duty as an employee of the Railroad Company and actually engaged in interstate traffic and commerce, being employed as an engineer on a freight train running between Bowling Green, Kentucky, and Paris, Tennessee. Decedent was a resident of Bowling Green, situated in the county in which the action was brought, and the Railroad Company was operating under a charter from the State of Kentucky, with a place of business in said county.

The injury was caused by the sudden jar or jerk resulting from the unexpected, unusual, and unnecessary application by the rear brakeman of the air brakes by the use of an emergency lever at the rear end of the train while the train was being backed on the siding at Cumberland, Tennessee, and while the decedent was leaning out of the window and moving the train under signals being received from the conductor.

The force of the jerk or jar was so great that the fireman was thrown from his seat on the left-hand side of the engine up against the boiler, and the head and right shoulder of decedent were severely injured by being thrown

against the engine at the right-hand window thereof, resulting later in his death.

Upon the conclusion of the evidence at the first trial the Company practically abandoned its plea of contributory negligence in diminution of damages, and tendered for leave of court to file (*"to conform to the proof"*) its amended answer (R., 27-28), asserting as a defense the assumption of risk, and in which proposed amended answer it was affirmatively averred (R., 28) "that said Stewart's alleged injury * * * *was the result of the jerking and jarring of the train under the circumstances as above set out,"* etc., said circumstances, as alleged and set out, including the use of the air brakes as the cause, but in no way involving the idea of contributory negligence on the part of decedent.

The Administratrix had to rely for the proof of the facts and circumstances immediately attending the injury upon the testimony of members of the train crew, all remaining in the employment of the Railroad Company, and some of whom were personally interested in relieving themselves, as far as possible, of the odium of culpability.

The indisputable physical facts and the printed rules of the Company were such, however, as to make it practicable, even with such hostile witnesses, for a state of facts to be presented before the jury at each of the two trials, on which liability of the Railroad Company was found *by the unanimous verdict of twelve jurors.*

At each trial, also, the judge who heard the evidence refused to sustain the demurrer to the evidence, and after the verdict of each trial the court overruled the motion of the Railroad Company for a new trial.

On both appeals the Court of Appeals of Kentucky sustained the action of the trial court in refusing to take the case from the jury, and also expressly found that there was evidence on which the jury might properly have found negligence on the part of the Company or its agents. The Court of Appeals did find, however, in its decisions on the

first appeal that there was reversible error, specifying certain Federal questions (including the erroneous idea that the verdict should have apportioned the damages among the beneficiaries), as will more fully appear by the assignments of error of the Administratrix below.

The instructions given by the Court of Appeals in connection with the retrial were such that the court erroneously required that there should be an apportionment among the beneficiaries of the full amount of the verdict, and there was also practically excluded from the consideration of the jury, in the assessment of damages, the amount of damages for the pecuniary costs of providing for these children the care, counsel, training and education which they might have reasonably received from their deceased father.

At the second trial the court otherwise pursued a course highly prejudicial to the interests of the beneficiaries, including the grant of leave to the Company to file an amended answer(R., 111), averring the payment on the life of decedent of insurance amounting to $5,000; also in permitting the Railroad Company at the second trial (R., 134 *et seq.*) to introduce testimony showing the collection by the widow of something over $5,000 insurance on the life of decedent, no part of which was contributed to or paid by the Railroad Company.

In view of such palpable error, naturally the amount of the verdict and judgment on the second trial was materially reduced; yet, not satisfied, the Company appealed to the Court of Appeals, with the result that the same was affirmed with costs and 10 per cent damages.

The alleged errors assigned on behalf of the Company in support of its writ of error in No. 485 will be referred to more in detail in the argument.

Since the suing out of the cross-writ of error there has been served on counsel for the Administratrix what is termed a "Motion to Quash Cross-writ of Error."

Assignments of Error.

The errors upon which the administratrix, as plaintiff in cross-writ of errors, relies for a reversal of so much of judgment of the Court of Appeals of Kentucky of March 26, 1915, as renders final its prior judgment of reversal of February 27, 1914, and for the reinstatement of her judgment rendered at the first trial, as shown by her assignment of errors (Printed Cross-Writ, Record, 904, pp. 2-4) are as follows:

> "First. That said Court of Appeals of Kentucky erred in its judgment of March 26, 1915, in so far as the same rendered final its prior judgment of February 27, 1914, reversing the judgment of the trial court of April 11, 1912, in favor of this plaintiff in error for $20,000.00 and costs and remanded the cause for a new trial and for further proceedings consistent with the opinion of December 19, 1913, and the modified opinion of February 27, 1914, of said Court of Appeals of Kentucky.
>
> "Second. That said Court of Appeals of Kentucky erred in its final judgment of March 26, 1915, in not setting aside its said prior judgment of February 27, 1914, and in not reinstating said judgment of the trial court of April 11, 1912, for $20,000.00 and costs.
>
> "Third. That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for $20,000.00 based upon the verdict of a jury rendered without the defendant in said action asking the trial court to instruct the jury to apportion the damages, erred in proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said act of Congress and that it was the duty of the trial court to instruct the jury to apportion the recovery between the beneficiaries; whereas said act of Congress has been construed directly to the contrary by the Supreme Court of the United States in a similar case, Central Vermont Railway

Company *vs.* White's Administratrix, decided June 21, 1915.

"Fourth. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000.00 and costs, erred in holding that instructions numbered 1 and 3, as voluntarily given by the trial court, were erroneous because the same 'might authorize the jury to consider mental anguish, and loss of companionship and so on,' to wit:

" 'Instruction No. 1. The court instructs the jury that if they believe from the evidence that on the occasion in controversy that the defendant's agents and employees in charge of its train, or any of them, did with negligence, operate and manage the train upon which plaintiff's intestate, W. H. Stewart, was serving as engineer, so as to cause him to fall against the cab of the engine and injure him, and that he died as the natural and proximate result of said negligence, if any, they shall find for plaintiff such a sum as will fairly compensate his estate for his death if it occurred wholly or in part from the negligence, if any, of the servants or agents of defendant as aforesaid, not to exceed the amount sued for, to wit: $35,000.

* * * * * * *

" 'Instruction No. 3. The court further instructs the jury that in estimating the damages aforesaid, if any, they may take into consideration the capacity of said Stewart to earn money the probable duration of life, his habits or industry, and sobriety and his skill in business in which he was engaged, but his habits of industry and sobriety are not to be considered by them except for the purpose of showing his power to earn money.'

"And said court further erred in its said opinion of December 19, 1915, in commenting upon said instructions as follows:

" 'The correct measure of damages in such cases has been so often pointed out by this court that it would seem unnecessary to cite authority; but in this case in the first instruction the plaintiff is permitted to recover such a sum as will fairly compensate his

estate for his death. Instructions similar to that have been frequently condemned upon the idea that it might authorize the jury to consider mental anguish, loss of companionship and so on. The true measure of damages is that sum that will compensate his estate for the destruction of his power to earn money. * * * Instruction No. 3 is erroneous for the same reason as instructions No. 1; it should have been in substance that the measure of recovery is such sum as will compensate his estate for the destruction of his power to earn money, and that the jury may, in arriving at this amount, consider all the evidence in the case bearing upon this question.'

"Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit proposed instructions upon that phase of the case; the said voluntary instructions of the trial court numbered 1 and 3 were not prejudicial to the defendant, but as given were more favorable to the defendant than to the plaintiff; taken together, they affirmatively convey the idea of financial support for the defendants, as contradistinguished from other forms of damages; and said instructions do not even suggest, what the Court of Appeals in its said opinion practically excludes, the right to have the jury find in damages the loss to each child 'of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation'; and

"Whereas said Court of Appeals of Kentucky itself, in its subsequent opinion of February 27, 1914, in 'Response to Petition for Modification and Rehearing,' said:

" 'Overlooking for the instant that this case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of a term of this court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal statute.

" 'Upon a new trial the measure of damages will be

given under the Federal statute as construed by the Supreme Court of the United States, all of which is carefully gone into and pointed out in the case of C. & O. R'y *vs.* Dwyer's Adm'x, 157 Ky., 590.

" 'To the extent indicated the opinion is modified.'

"Fifth. That the said Court of Appeals of Kentucky in reversing said judgment for $20,000.00 and costs erred in holding that instruction No. 4, as voluntarily given by the trial court, was erroneous, to-wit:

" 'Instructions No. 4. The court instructs the jury that in the operation of defendant's train it was the duty of the plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition. then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions.'

"Whereas the defendant in said trial court utterly failed to exercise its opportunity to point out any alleged error in said instruction or to submit to said trial court any proposed instruction upon that phase of the case; and, although said instruction was conformable to the Federal statute and could not be prejudicial to the defendant in said action, yet, by reason of the lack of evidence of negligence on the part of decedent, the voluntary submission by the court of an instruction suggesting possible negligence on his part necessarily tended, if anything, toward the prejudice of the plaintiff in said action, this plaintiff in error, and not to the prejudice of the defendant in said action.

"Sixth. That said Court of Appeals of Kentucky especially erred in finding in its opinion that Hill, the flagman, was not negligent under the proof in applying the emergency brake and that he did the only thing which he could reasonably have done, and holding that in another trial of the case the second

instruction which deals alone with the negligence of Hill should be eliminated if the evidence is the same, for the reason that the evidence showed that Hill was guilty of gross negligence in that he should have been near the switch staff instead of several hundred feet away, and that he had no duty elsewhere, and that there was no necessity to apply the emergency brake, and that instruction No. 2 was properly given. Said instruction is as follows:

" 'Instruction No. 2. The court instructs the jury that under the rules of defendant's company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle-cock on the rear of the train, only when necessary to avoid injury to life or property; and if they believe from the evidence that at the time said Hill applied said emergency air brake it was not necessary nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake to avoid injury to life or property, and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death as the direct and proximate result of the application of said emergency air brake, then they should find for plaintiff.'

"Seventh. That said Court of Appeals of Kentucky, in reversing said judgment for $20,000 and costs, erred in holding that there was any reversible error in the trial court at the first trial in which said judgment for $20,000 and costs was rendered."

ARGUMENT.

The argument will be divided into two parts, namely:

Part I will be in support of the cross-writ of error sued out by the Administratrix in case No. 904, and

Part II will constitute a response to brief of the Railroad Company, as plaintiff in error, in case No. 485.

PART I.

Cross-writ of Error.

I.

Jurisdiction.

As preliminary to a more detailed presentation of the questions involved in the assignments of error it is deemed appropriate under this head to discuss the matter of the jurisdiction of the trial court, including a brief reference to the untenable suggestion that said court was without jurisdiction, by reason of the Seventh Amendment to the Federal Constitution, and under the head of jurisdiction of this court it is proposed to show that the cross-writ of error was not only appropriately taken, but also that it is within "the power and duty" of this court, in the event it shall find that the errors assigned are well taken, to reinstate the judgment for $20,000 and costs, dated April 11, 1912, as rendered in favor of the executrix at the first trial.

(*a*) *Jurisdiction of Court of First Instance.*

There is no question but that the circuit courts of Kentucky, including the Warren Circuit Court, in which this action was brought and tried, are State courts—

> "of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of the State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut (Kentucky) give no right of recovery (223 U. S., p. 57."
>
> L. & N. R. R. Co. *vs.* Melton, 218 U. S., 36, 47.

The attack made upon the constitutionality of the statute upon certain grounds specified in the special demurrer (R., 6) has been practically abandoned by reason of decisions of this court to the contrary, and, as the facts averred and proven clearly bring the case within the purview of the Federal Employers' Liability Act, the trial court undoubtedly had jurisdiction.

Second Employers' Liability cases, 223 U. S., 57-59.

Seventh Amendment to Constitution.

Although at the second trial, as will hereafter be discussed, the Railroad Company requested the court to give an instruction to the effect that a unanimous verdict of the jury was essential *as against the defendant*, it was nowhere claimed, either at the first or second trial, that the jury of twelve men, as actually chosen, agreeably to the laws of Kentucky, was not a common-law jury.

Thus, even should this court be disposed to hold—what counsel for defendants in error in cases Nos. 321, 399, 453, 473, 485, and 743 have denied and argued by separate brief—that the Employers' Liability Act contemplates a common-law jury in State courts in the enforcement of the rights thereby conferred, it cannot be successfully contended that the circuit courts of the various counties of Kentucky are without power to entertain jurisdiction of a case

of this charteter, its juries, as drawn, being composed of twelve qualified men.

It is true that the constitution and laws of Kentucky permit nine or more jurors to bring in a verdict; yet both the State constitution and the statute specifically state:

> "But where a verdict is rendered by a less number than the whole jury, *it shall be signed by all the jurors who agree to it.*" (Italics supplied.)
> Sec. 248, Kentucky Constitution.
> Sec. 2268, Kentucky Statutes (Carroll).

Thus the laws of Kentucky not only provide a common-law jury of twelve, but also a sure measure whereby to determine from the face of the verdict whether it is a unanimous verdict or not.

In the case at bar the verdict was the unanimous verdict of twelve men, against the regularity of whose selection no question was raised.

Therefore, however this court may be disposed to treat Kentucky verdicts of less than twelve, we submit that, even the most extreme view which the court might take of the applicability of the Seventh Amendment to the trial of Federal Employers' Liability Act cases in the State courts, the actual unanimous verdict of twelve jurors, as in the case at bar, would hardly be disturbed.

> C. & O. Ry. Co. *vs.* Kelley's Admr., 171 S. W., 185, 186.

There was undoubtedly jurisdiction on the part of the trial court to entertain and try the action.

(*b*) *Jurisdiction of This Court.*

It will hardly be denied that a party who has asserted a right, privilege, or immunity under a Federal statute and has been deprived thereof by judgment of a State court can

be deprived of a right to a review by writ of error from this court to the appropriate State court.

Nutt *vs.* Knutt, 200 U. S., 12.

The chief justice of the Court of Appeals of Kentucky has recognized this right in the case at bar by allowing the writ.

Even where the right was erroneously asserted under the Federal Employers' Liability Act, this court will hear and determine the case on its merits.

Shanks *vs.* D., L. & W. R. R. Co., 239 U. S., 556.

It will be contended by the Railroad Company, however, that the writ of error should have been taken within two years from the judgment of reversal of February 27, 1914 (R., 110), and not from the final judgment of March 26, 1915 (R., 218).

The answer to this is that, measured by the plain and unequivocal language of this court repeatedly uttered, the judgment of February 27, 1914 (R., 110), reversing the judgment for $20,000 of April 11, 1912, remanding the case to the trial court for a new trial and "for further proceedings consistent with the opinion and modified opinion herein," was not a final decision or judgment within the meaning of the statute, and no writ of error from this court to the State court would then have been allowed.

C. & O. Ry. Co. *vs.* McCabe, 213 U. S., 207, 214.
La. Nav. Co. *vs.* Oyster Commission, 226 U. S., 99, 102.

In the McCabe case (*supra*) there was three trials by the Mason County Circuit Court, Kentucky, and two reversals and one affirmance by the court of appeals of that State, and Mr. Justice Day, speaking for this court, said:

> "Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded

for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. *Nor is it material that the State Supreme Court regarded itself as bound by the decision in the former appeal as the law of the case* and declined in the judgment now under review to again consider the question. *The judgment under review was the only final judgment in the appeal court of the State from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review.*

"Schlosser *vs.* Hemphill, 198 U. S., 173, and cases therein cited." (Italics supplied.)

Power and Duty to Reinstate Original Judgment.

In the later case, Louisiana Navigation Company *vs.* Oyster Commission (*supra*), the present chief justice of this court cited the McCabe case with approval, and said:

"The rule which excludes the right to review questions arising in a cause depending in a State court until a final judgment is rendered by such court involves *as a necessary correlative the power and the duty in this court, when a final judgment in form is rendered* and the cause is brought here for review *to consider and pass upon all of the Federal controversies in the cause irrespective of how far it may be that by the State law such questions were concluded during the litigation and before a final judgment susceptible of review here was rendered.*

"Chesapeake & Ohio Ry. Co. *vs.* McCabe, 213 U. S., 207, 214." (Italics supplied.)

Thus is made clear that it is within "the power and duty" of this court to take jurisdiction under the writ of error in No. 904, and, if the errors assigned are sustained, to proceed by appropriate judgment to restore to the original plaintiff in the action the rights of which she and those

whom she represents have been deprived by the reversal of the original judgment for $20,000 of April 11, 1912.

This can alone be done by giving directions for the reinstatement of said judgment for $20,000 and costs.

In addition to the last two cases cited, the attention of the court is invited to the following additional authorities:

Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585.

Perkins *vs.* N. P. Ry. Co., 199 Fed., 712, 719.

Coit *vs.* Sistare *et al.*, 85 Conn., 573.

Ann. Cas., 1913C, vol. 28, p. 248—note 250 (prior decision in this court—Sistare *vs.* Sistare, 218 U. S., 1).

Ragan *vs.* Cuyler, 24 Ga., 397, 400.

Hill *vs.* the W. Chicago Park Coms., 185 Ill., 150.

Cahill *vs.* Likenthal, 62 N. Y. Sup., 525.

Muse *vs.* Stern, 82 Va., 33, and cases cited.

Green Co. *vs.* Thomas, 211 U. S., 598, 602-3.

does not cite. yet 240 U.S. (after 2/16)

In one of these recent cases the original decree of the trial court had been twice disapproved and once reversed by the intermediate appellate court, yet Mr. Justice Pitney, in delivering the opinion of this court, reversed both decrees of the Court of Appeals of the District of Columbia,

> "and the cause was remanded with directions to *reinstate* and affirm the decree of the Supreme Court of the District of Columbia bearing date January 4, 1906, and *to reverse and set aside all subsequent decrees so far as inconsistent therewith.*" (Italics supplied.)
>
> Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585.

In other cases cited a similar course was pursued with respect to the reinstatement of judgments at law.

Thus it will be seen that this court not only has jurisdiction to entertain the cross-writ of error and to correct the

errors, but that the same is coupled with the power and duty to reinstate the judgment.

II.

Motion to Quash Cross-Writ of Error.

The Railroad Company served on counsel a proposed motion in case No. 485, so termed, with brief in support thereof.

No effort will be made either to characterize or give a place under the rules of practice of this court to this motion.

So far as it may attempt to attack the jurisdiction of this court over case No. 904, it is believed the above argument under the head of "Jurisdiction of This Court," as well also as the authorities cited in the Company's brief in support thereof, including the McCabe case, sufficiently negatives the attack.

To the extent that said motion and brief relate to the merits of the assignments of error of the Administratrix, reference is made for reply to the discussion of those assignments below in this brief.

The suggestion that the right conferred by the statute to the Administratrix to sue out her writ of error at any time within two years from the date of final judgment is limited by any law or principle requiring her to seek and obtain the allowance of the writ at a much earlier date and within the term of this court in which the other party to the same action sues out its writ is not well founded, and the authorities cited on page 5 of the brief in support of the motion do not sustain the contention.

Grigsby *vs.* Purcell, 99 U. S., 505.
U. S. *vs.* Burchard, 125 U. S., 176.
The S. S. Osborne, 105 U. S., 447.
The Tornado, 109 U. S., 110.
Hilton *vs.* Dickson, 108 U. S., 165.

Briefly stated, these authorities do hold that after an appellant or plaintiff in error notes an appeal in the lower court and this court acquires jurisdiction it is encumbent upon such appellant or plaintiff in error to proceed without undue delay to docket his case in this court and to become active in its prosecution here, and, if a term of this court is allowed to pass without his doing so, the appeal or writ of error may be dismissed *on the theory of laches,* either on the motion of the appellee or defendant in error or by the court on its own motion.

The present rule of the court (Rule 9-1) supplies appellees and defendants in error with a specific remedy whereby they may docket a case for the purpose of having the same dismissed. The same rule, sub-paragraph 2, guarantees to the plaintiff in error or appellant the right to have his case "stand for argument" in the event the case is docketed and a copy of the record is filed by him with the clerk of this court before the return day.

In the case at bar the Administratrix not only filed her record, docketed her case (904), and ordered the record printed prior to the return day in her case, but within a week of the time she filed her assignments of error and petition for writ in the Court of Appeals of Kentucky.

The Railroad Company, as defendant in error in that case, has not only not availed itself of the remedy provided by the rules for speeding such a case, but there has been absolutely no basis in fact on which to base a motion on its part to docket and dismiss.

Hence its motion in case 485 to quash cross-writ of error.

III.

Reversal Based on Federal and Not State Questions.

Preliminary to a more detailed discussion of the assignments of error, the attention of the court is called to the fact that all the questions decided adverse to the Administra-

trix in the opinion of the Court of Appeals of December 19, 1913 (R., 104-9), and the modified opinion of February 27, 1914 (R., 109), mentioned in the judgment of reversal (R., 110), as made final by the final judgment of March 26, 1915 (R., 218), were Federal as contradistinguished from State questions.

It is true that the Railroad Company contended that the complaint was defective in not having made more specific the allegations of negligence, but the Court of Appeals correctly held that this was a question of local practice and *decided the same in favor of the Administratrix* (R., 107), saying:

> "So that the general allegation of negligence being held sufficient in this State prior to the enactment of the Employers' Liability Act, such a plea will be held good even when proceeding under that act."

We shall, therefore, pass to a discussion of errors assigned after presenting a single extract from one of the more recent decisions of this court:

> "It is well settled that where the State court does not decide against the plaintiff in error upon an independent State ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment," etc.
>
> Rogers *vs.* County of Hennepin *et al.*, 239 U. S., 621.

IV.

Crucial Error—Apportionment of Verdict.

The third assignment would seem appropriate to present first, because it points out at least one error which the opinion on rehearing cannot be construed as being intended to correct. It is as follows:

> "That the Court of Appeals of Kentucky, in reversing said judgment for this plaintiff in error for

> $20,000 based upon the verdict of a jury rendered without the defendant in said action asking the trial court to instruct the jury to apportion the damages, erred in proceeding upon the hypothesis that such apportionment was essential to a valid judgment under said act of Congress and that it was the duty of the trial court to instruct the jury to apportion the recovery between the beneficiaries; whereas said act of Congress has been construed directly to the contrary by the Supreme Court of the United States in a similar case, Central Vermont Railway Company *vs.* White's Administratrix, decided June 21, 1915" (238 U. S., 507).

The Court of Appeals of Kentucky apparently went upon the hypothesis that the case of Gulf, Colorado, &c., Ry. Company *vs.* McGinnis, 228 U. S., 173, was controlling as applied to the case at bar. In this McGinnis case there was one married daughter of decedent, whose dependency was neither alleged nor proven and the trial court was requested, but declined, to instruct the jury that it could not find any damages in her favor, whereas in the case at bar it was both averred and proved that all of the beneficiaries, the widow and three minor children, were dependents, and no request was made by the Railroad Company for an instruction directing apportionment of the verdict among the beneficiaries.

In fact the case at bar was on all fours with that mentioned in the third assignment of error, wherein this court (syllabus) held:

> "7. A general verdict for the plaintiff may be returned by the jury in an action brought by the administratrix under the Federal Employers' Liability Act of April 22, 1908, for the benefit of the widow and minor children of the deceased employee *without apportioning the damages between the beneficiaries.*" (Italics supplied.)

In delivering the opinion of this court in that case Mr. Justice Lamar said:

"Under Lord Campbell's act (9 & 10 Vic., chap. 93, §2) and in a few of the American States the jury is required to apportion the damages in this class of cases. But even in those States the distribution is held to be of no concern of the defendant, and the failure to apportion the damages *is held not to be reversible error* (Norfolk & W. R. Co. *vs.* Stevens, 97 Va.., 631 (1), 634; 46 L. R. A., 367; 34 S. E., 525; International & G. N. R. Co. *vs.* Lehman—Tex. Civ. App., 72 S. W., 619)—*certainly not unless the defendant can show that it has been injured by such failure.* The Employers' Liability Act is substantially like Lord Campbell's Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal Statute conform to what was the rule in most of the States in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, *it would be necessary also to enter upon an investigation of the domestic affairs of the deceased*—a matter for probate courts, and not for jurors. If, as in the McGinnis case, the *plaintiff sues for the benefit of one who is not entitled to share in the recovery* (citing cases), *and if her inclusion in the suit might increase the amount of the recovery,* the defendant may raise the question in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling *which will prevent a recovery for one not entitled to share in the benefits of the Federal act.* But no such question was *or could have been raised in the present case, since, as a matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father.*" (Italics supplied.)

And yet the Court of Appeals in the case at bar reversed the judgment based on the verdict *in solido* for the benefit of

the widow and minor children of decedent, and, in remanding the case for a new trial, gave the following directions (R., 108-9):

> "The court will also upon the return of the case give such instructions to the jury *as will apportion the ultimate recovery,* if any, *between the beneficiaries* as is suggested by the Supreme Court in the case of Gulf, Colorado, etc., Ry. Co. *vs.* McGinnis, 228 U. S., 172." (Italics supplied.)

On rehearing (R., 109) the court said:

> "Overlooking for the instant that the case was tried under the Federal Employers' Liability Act, and by reason of the haste and confusion incident to the closing day of the term of this court, the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial instead of the measure of damages prescribed by the Federal statute."

An equally serious error, of course, was committed with regard to the necessity for an apportionment of verdicts, but the modified opinion (R., 109) contains no language which can be construed as correcting this error. Quite the contrary, for the decision of the court in C. & O. Ry. *vs.* Dwyer's Administratrix, 157 Ky., 590, referred to as the criterion on the measure of damages, specifically held, as more particularly set forth below, that the jury should have been instructed to apportion the same in their verdict.

Indeed, as will appear from the discussion to follow, there was so little semblance of ground for reversible error in what was left that we have been inclined to think that the erroneous conception by the court on the subject of apportionment of verdicts probably accounts for the failure of the Court of Appeals to affirm the judgment on rehearing.

If this idea is correct, the most charitable view which could be taken with regard to the errors on which the balance of the assignments are based is that the language used

by the appellate court was by way of a lecture for the edification and guidance of the trial court in a case whose retrial was considered inevitable by reason of its failure to require an apportionment of the verdict on the first trial.

The crucial error corrected, the valid judgment based upon the valid verdict should be reinstated.

V.

No Error Prejudicial to Railroad.

Under this head will be discussed the fourth, fifth, sixth, and seventh assignments of error.

Inasmuch as all the alleged errors mentioned by the Court of Appeals, except that last above discussed, were based upon alleged errors on the part of the trial court in its instructions to the jury at the first trial, it is deemed appropriate to state that the Railroad Company did not propose at the trial an instruction on a single point forming the subject-matter of comment or ruling by the Court of Appeals adverse to the Administratrix.

Furthermore, even where the Railroad Company excepted to an instruction to the jury, the ground of its objection was not stated and the character of the alleged errors were not pointed out in the trial court.

On this point, and as preliminary to a more detailed argument of the particular points, the attention of the court is respectfully invited to a decision of this court on writ of error to a State court, rendered as late as January 31, 1916, in which it was (syllabus) held that—

> "The failure of the trial court particularly to specify in its charge in an action under the Federal Employers' Liability Act of April 22, 1908 (35 Stat at L., 65; Chap. 149 Comp. Stat., 1913, §8657), some matters to which its attention was not suitably called, is not ground for reversal."
>
> Ill. Cent. R. R. Co. *vs.* Skaggs, 240 U. S., 66.

In this case Mr. Justice Hughes, for the court, said:

> "While under the local statute (Gen. Stat. Minn., §7830) the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, *we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of failure on the part of the trial court to particularly specify in its charge some matter to which its attention had not been suitably called.*"

In the case at bar the objections were general as to all the instructions as given by the court, and, even in the Company's motion for a new trial (R., 18-19), none of the alleged errors mentioned by the Court of Appeals were pointed out, *and instruction 4 (on contributory negligence) was omitted altogether.*

In the light of all this let us proceed to a discussion of these assignments of error.

(a) *Instruction 4—Contributory Negligence.*

In the decision of the Court of Appeals of December 19, 1913 (R., 108), on this point the court said:

> "Instruction No. 4 *should be* given on a new trial in conformity with the rule laid down in Nashville, Chattanooga & St. Louis Railroad Company *vs.* Banks this day decided, 156 Ky., 609." (Italics supplied.)

It is a matter of conjecture with counsel whether or not the Court of Appeals intended by this reference to indicate that in its opinion the trial court committed reversible error in giving the instruction on the subject of contributory negligence at the first trial. We feel sure no such error was committed. Out of abundant precaution we have embraced this feature in our fifth assignment of error.

The trial court on the first trial voluntarily gave the following:

> "Instruction No. 4.—The court instructs the jury that in the operation of defendant's train it was the duty of plaintiff's intestate as engineer to exercise ordinary care for his own safety and if he failed to exercise such care and his own negligence contributed in any way to produce the injuries, if any, complained of in the petition, then to the amount of such negligence, if any, attributable to said Stewart, the jury shall diminish the damages, if any, which may be found by them, if any at all, under these instructions."

Assuming, for the sake of argument, that the court had amplified the subject of comparative negligence and had explained the same to the jury, in the language of Mr. Justice Van Devanter used in the opinion in N. & W. Ry. Co. *vs.* Earnest, 229 U. S., 114, then we submit that *the result of such instruction could not be more beneficial to the Railroad Company than the instruction given. There was no evidence before the jury on which to find any negligence whatsoever.*

The giving of any instruction on the subject, therefore, while detrimental to the plaintiff, could not have been prejudicial to the Railroad Company.

At the time of the injury decedent was obeying the orders of his conductor and was moving the train in obedience to the conductor's signals.

The Railroad Company did not request the court to give an instruction on the subject. On the contrary, it had, in effect, abandoned this defense. It introduced no evidence in support of such defense. Upon the conclusion of the evidence at the first trial the Company tendered for leave of court to file (*"to conform to the proof"*) its amended answer (R., 27-28), asserting the defense of assumption of risk, and in which it was affirmatively averred (R., 28)—

> "that said Stewart's alleged injury * * * *was the result of the jerking and jarring of the train under the circumstances as above set out,"* etc.

And the alleged circumstances so set out nowhere charged or imputed, or undertook to impute, to the decedent any negligence on his part in the premises whatsoever.

Furthermore, the Railroad Company, by its motion for new trial (R., 18, 19), made no reference to and did not claim error on the part of the trial court in giving said voluntary instruction No. 4.

Under these facts, even if there had been error in the form of the instruction, which is denied, it could only have tended to the disadvantage of the Administratrix and could not by any possibility be held to be prejudicial error as against the Railroad Company. And by its conduct the Company was and is estopped to assert prejudicial error by reason of said instruction.

(*b*) *Measure of Damages.*

This question forms the subject-matter of our fourth assignment of error, wherein is more particularly set forth the trial court's instructions 1 and 2, the comment thereon by the Court of Appeals in its opinion of December 19, 1913 (R., 108), and its repudiation of its own position (R., 109) by modified opinion on rehearing February 27, 1914. As will also appear in the fourth assignment, the trial court is directed on retrial to follow the course as "pointed out in the case of C. & O. Ry. *vs.* Dwyer's Administratrix, 157 Ky., 590," and in which last-mentioned decision, as rendered two days before, February 23, 1914, the Court of Appeals, after discussing decisions of this court in the McGinnis, Vreeland, and Didricksen cases, found that—

> "The *recovery should have been confined by the instruction on the measure of damages,* in the event of a finding for the plaintiff, *to such a sum in dam-*

> *ages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence might show they had a reasonable expectation of receiving from the decedent,* if his death had not been caused by the negligence of the defendant, if it was so caused; and after thus finding for the plaintiff a sum sufficient to compensate all the beneficiaries named, *it should have been apportioned by the jury among the beneficiaries,* stating in their verdict how much, if anything, they find for each of them; the damages altogether not to exceed the amount claimed in the petition." (Italics supplied.)

In the Vreeland case, 227 U. S., at page 71, this court expressly stated that the word "pecuniary"

> "as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation."

The restrictive language quoted from the instructions given by the Court of Appeals in the Dwyer case, as made applicable by the court in its modified opinion to the retrial ordered, not only contains the error forming the subject-matter of our third assignment of error (apportionment of verdict), but was so restrictive in its terms as to exclude the idea and practical benefits to the children of decedent, so declared by this court in the Vreeland case to be within the rights conferred on them by the Federal statute.

By way of parenthesis, it may be said that the trial court, on the second trial, followed these erroneous directions by not only requiring an apportionment of the verdict but also expressly prohibiting the jury from considering "the proof as to decedent's habits of industry and sobriety, *only as affecting his power to earn money*" (instruction 2, R., 120), thus excluding from the consideration of the jury the equipment

in "habits of industry and sobriety" of the parent, in determining the amount of the pecuniary costs of providing for these children the care, counsel, training, and education which they might have reasonably received from the parent.

But the effect of this action of the Court of Appeals on the second verdict is a matter apart from the subject now under consideration, namely, did the instruction as actually given by the trial court at the first hearing affect prejudicially the Railroad Company? We say it did not. On the contrary, the instructions as actually given at the first trial on the subject of the measure of damages was prejudicial to the dependents of decedent, and, furthermore, the conduct of the Railroad Company in respect to the result brought about estops it from picking technical flaws in the instruction given and of trying to avail itself of such benefits as could be involved in the Court of Appeals considering the same as an element, if it did so treat the instructions, in its reversal of the original judgment of the trial court.

By a careful reading of instructions numbered 1 and 3, as set forth in full in the fourth assignment of error above, it will be seen that said instructions are both sound in pecuniary damages, as contradistinguished from any other character of loss. Therefore they did not even tend to increase the damages above the pecuniary loss. On the contrary, these instructions wholly failed to point out or convey the idea that the jury should have assessed for the loss of that care, counsel, training, and education which the children might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation. In fact, by the third instruction on this first trial, the trial court said—

> "but his habits of industry and sobriety are not to be considered by them *except for the purpose of showing his power to earn money.*" (Italics supplied.)

Contributing as it did to the character of instructions given by the court, as suggested in the outset of this branch of the

argument, the Railroad Company utterly failed at the trial either to offer an instruction on the subject itself or to point out to the court wherein the instructions given were either technically or substantially defective. Furthermore, as to the aforesaid substantial defect, *wholly prejudicial to the dependents of decedent*, the Railroad Company actively participated. It filed a motion to strike from the petition (R., 11) averments on which this element of the damages could be predicated, and, by objection to the introduction of testimony (R., 29 *et seq.*), it sought to have eliminated evidence of important facts bearing directly upon this phase of the subject.

Such substantial error as was made in the instructions on the measure of damages at the first trial, we submit, tended toward the injury of the dependents of decedent and was not in any sense prejudicial to the Railroad Company. Such technical defects as may be found in said instructions were innocuous, and their existence was contributed to by the silence of the Company when it was its duty to speak.

There was no error in the instructions on the measure of damages prejudicial to the Railroad Company.

(c) *Negligence of Flagman Hill.*

By the sixth assignment errors are pointed out in the decision of the Court of Appeals of December 19, 1913, on the subject of the negligence of the rear flagman, Hill, which can only be of importance in the event this court should fail to reinstate the judgment obtained at the first trial.

This error could not have been the cause of the reversal of the original judgment of the Court of Appeals, because, in its said decision of December 19, 1913 (R., 107), the Court of Appeals expressly found that there was negligence on the part of the Railroad Company in the premises. Furthermore the court in said decision sustained the action of the trial court in overruling the demurrer to the evidence and in refusing to give a peremptory instruction.

Concluding this branch of the argument it is deemed not

inappropriate to say that having discussed each error alleged in the opinions of the Court of Appeals on the first appeal and shown that the position of that court was either not well founded in law or that such semblance of error as there was in the instruction of the trial court was unsubstantial as against the Railroad Company, the conclusion is irresistible that there was no error in the first trial prejudicial to the Railroad Company. The action of the Court of Appeals, therefore, in reversing the original judgment and ordering a new trial constituted a substantial, although not an immediately appealable, judgment adverse to the plaintiff in the action and cross-writ of error.

VI.

Reinstatement of First Judgment.

The first and second assignments of error embody the idea of the error involved in rendering final, by the judgment of March 26, 1915 (R., 218), the previous non-appealable judgment of reversal (R., 110) of February 27, 1914.

In view of the language of this court in the McCabe case, on writ of error to the same State court, which was quoted in the opening branch of this argument (p. 15), it is immaterial that the Court of Appeals of Kentucky should feel itself or be bound by its own judgments of reversal. When a case, pending in the State courts of Kentucky, reaches the stage where a final judgment is rendered and a writ of error is sued out, then this court for the first time acquires jurisdiction, because of the rule which this court has established in the construction of the statute governing its jurisdiction to review on writ of error the final judgments of the highest courts of the States. The effect of the rule is so tersely stated by the Chief Justice of this court in Louisiana Navigation Company *vs.* Oyster Commission (*supra*) that we quote it again:

> "The rule which excludes the right to review questions arising in a cause depending in a State Court until a final judgment is rendered by such court involves *as a necessary correlative* the power and the duty in this court when *a final judgment in form is rendered* and the cause is brought here for review, to consider and pass upon all of the Federal controversies in the cause, irrespective of how far it may be that by the State law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered." (Italics supplied.)

In the case at bar all questions decided adverse to the plaintiff in error in the cross-writ of error being Federal and all State questions having been decided in her favor, in the light of the decisions in the McCabe and Louisiana Oyster Commission cases, it would seem to be unnecessary to enter upon a discussion of the question of how impossible it was to expect the Court of Appeals, after the second trial was had, to set aside its former judgment of reversal of the judgment obtained at the first trial. It is enough to say that, in contemplation of the Federal law as thus so clearly declared by this court, the final judgment of March 26, 1915, involved by necessary inference or intendment the ratification and confirmation by the Court of Appeals of its prior decisions and judgment adverse to the administratrix and those whom she represents.

In other words, the error committed by the Court of Appeals of Kentucky in reversing the original judgment of the trial court in favor of the administratrix was carried into and became perpetuated by the final judgment of that court of March 26, 1915, and, in effect, undertook to substitute for the original judgment for $20,000 with costs, the lesser judgment of the second trial for $11,885 with costs and damages.

This, of course, constitutes the error of which complaint is made, and all the other errors, on each of which we insist, culminate in this one.

Having shown, under other branches of the argument, that there existed no error in the first trial on which the reversal

could appropriately be made, and, therefore, that there was no justification for a perpetuation of the injury through final judgment, it follows logically that the original judgment should be reinstated and, with such reinstatement, of course, all the proceedings following and predicated upon the basic error of reversal must count for naught.

In view of the authorities presented bearing directly upon this proposition under the head of "Jurisdiction," subhead "Power and Duty to Reinstate Original Judgments (pp. 16-17) above, it is deemed unnecessary to cite further authority here.

It is respectfully submitted that this cross-writ of error should be sustained and that the original judgment as obtained at the first trial for $20,000 and costs should be reinstated under the directions appropriately made by this honorable court.

PART II.

VII.

Response to Writ of Error in No. 485.

The assignments in support of the cross-writ of error (No. 904) are confined to those errors of the Court of Appeals by which the administratrix is sought to be deprived of the judgment rendered at the *first* trial. If this court shall sustain this cross-writ and direct the reinstatement of that judgment, the judgment rendered at the second trial would necessarily be supplanted and eliminated by said *first* judgment, without the necessity for any consideration being given by this court to the *second* trial.

Should this court not sustain said cross-writ and reinstate the first judgment, then the second judgment must stand, unless this court shall find, on the assignments of

the railroad company, that error prejudicial to the company was committed in both courts below.

As such errors as were committed at the second trial of a prejudicial character were *against* the *administratrix* and in *favor* of the *railroad company* we apprehend no such action by this court.

At the end of six years of litigation with the company over the loss (nearly eight years ago) of the family bread winner to the administratrix the matter of bringing the litigation to a speedy conclusion has become an intensely practical question. If the court does not restore the first judgment, the administratrix, whose limitation of endurance in the unequal contest is well-nigh reached, must take the amount of the *second* judgment, with costs, interest, and damages below, together with such damages and costs as this court may see fit to allow under its Rule No. 23.

Hence the assignments on cross-writ of error were not so framed as to seek a *third* trial, but rather to have *restored,* by this court, *the original judgment,* which we have argued above should never have been reversed by the Court of Appeals.

Still insisting upon the right of the beneficiaries to a reinstatement of the original judgment, it is deemed appropriate to proceed to a discussion of the questions involved in the writ of error as sued out by the railroad company.

VIII.

Alleged Judgment of April 29, 1915.

In the opening paragraphs of this brief (pp. 2, 3) attention was called to the fact that there is no judgment in the record as presented corresponding in date (April 29, 1915) to that mentioned in the petition of the railroad company for the allowance of its writ of error here under discussion (R., 222).

The final judgment in the court below, according to the record, consists of the "judgment of affirmance of the Court of Appeals entered herein on the 26th day of March, 1915" (R., 218). T. P. R. R. Co. *vs.* Gentry, 163 U. S., 353.

It is respectfully suggested that the judgment of affirmance was the proper basis for the writ of error; and that, in any event, there is no order of April 29, 1915, in the record whereon to base the writ of error, as allowed by the chief justice of the Court of Appeals therefrom.

Without further discussion of this phase of the matter, but not conceding that the writ of error has been properly taken, we will pass to a discussion of the alleged errors as assigned by the railroad company as if same were based upon final judgment of March 26, 1915 (R., 222).

IX.

Alleged Immunity from Costs, Interest, and Damages.

The first assignment of error on behalf of the railroad company asserts the remarkable proposition that, in the absence of affirmative provision in the Federal Employers' Liability Act therefor, the proper court of the State in which the deceased employee resided at the time of his death, and in which State the railroad company is chartered, is powerless to apply the State law and practice in the following particulars, to wit:

(*a*) By including in the judgment the costs of the action so brought in the State court to enforce the right created by the Federal statute;

(*b*) By permitting the principal of the judgment to bear the legal rate of interest from date of the judgment; and, furthermore.

(*c*) That the Court of Appeals of said State may not comply with the State statute (sec. 764, Code of Civil Practice) requiring that court, "upon the affirmance of an appeal

from a judgment for the payment of money, the collection of which has been superseded," to award "against the appellant" "ten per cent damages on the amount superseded."

It does not appear by the record that propositions (*a*) or (*b*) were raised by the railroad company in the trial court, either before or after judgment, or that any of the propositions were raised in the Court of Appeals prior to the filing of the assignment of errors preliminary to the allowance of the writ of error.

Apparently mistaking the distinction between basic rights, granted by the Federal statute, and matters incident to the enforcement of those rights through the State courts, the company in its brief quotes from the decision in Michigan Central Railroad *vs.* Vreeland, 227 U. S., 59, 66, to the effect that—

> "We may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury."

Mr. Justice Lurton, of course, had reference here to the fact that the right of action accorded to the decedent as such, under the statute, lapsed upon, and that his individual cause of action did not survive, his death. Of course, as the right did not originate under any State statute, it was immaterial what the local statute may have provided with respect to the survivorship of causes of action granted by the State law.

This, however, is no authority for the contention that the railroad should be immune from the ordinary costs incident to the establishment of the right in State court, or from interest on a judgment rendered pending payment, or damages under supersedeas statute in the event it shall not prosecute its appeal with effect.

Neither does the case at bar fall within the principle involved in New York State court decision, cited by counsel on page 19 of their original brief, to the effect that interest upon the verdict *"from the time of the death of the plain-*

tiff's intestate," could not be allowed under a State statute which the court held had no application to the action in question based on the Federal Employers' Liability Act.

To what extent this New York decision has been, or may be, used as authority for extreme rulings upon the subject, it is needless here to inquire.

There is not involved, in any one of the three elements forming the subject-matter of the assignment of error under discussion, a departure from the universal application of the Kentucky laws of procedure to litigation in the courts of that State, laws which, by necessary implication, must apply to the litigation of rights in the courts of that State regardless of the origin of the rights or citizenship of the litigants.

The railroad company, though including the item of costs in the assignment of error, does not press this particular feature in their argument.

It is, however, quite as well founded in principle as either of the other two points, because the Federal statute conferring the right is quite as silent on the subject of the award of costs of actions to enforce the right as it is silent on the subject of interest on such judgment from the date of its rendition and the orderly application of the State law to the computation, as a matter of course, of the damages upon the amount superseded upon the unsuccessful termination of an appeal from a judgment superseded.

If the silence of the statute has the effect, as contended, of granting immunity from costs, interest, and damages in the State courts, the same must be equally true where resort is had to Federal courts in actions brought for the enforcement of the rights conferred by the statute.

This court in passing on such cases has not only uniformly required the unsuccessful railroad company in such cases to pay the costs in this court and repeatedly adjudged costs against them in affirming the judgments of both State and Federal courts; but this court has also not hesitated to ex-

ercise its general authority, under section 1010, U. S. R. S., and agreeably to Rule 23, by imposing damages against interstate carriers for frivolous writs of error based on judgments obtained under this very statute.

Southern R'y Co. *vs.* Gadd, 233 U. S., 572.

If section 1010 can be applied at the option of this court as a penalty, surely section 764 of the Civil Code of Kentucky, constituting as it does a uniform means for the enforcement of the supersedeas law of that State, was likewise enforcible through the Court of Appeals of Kentucky.

If these laws and both State and Federal laws as to costs apply by necessary implication to actions under the Federal Employers' Liability Act, it would seem that the State statute on the subject of interest, expressly made the law applicable to action in Federal courts by section 966, U. S. R. S., must apply to judgments under the Federal Employers' Liability Act obtained in State courts as well as those obtained in Federal courts.

Kentucky Statutes (Carroll), § 2220, Act December 3, 1892.

Furthermore, all of these features of the judgment below, arising as they do as mere incidents of the procedure in the State court for the enforcement of the rights conferred by the statute, present purely State questions, which this court will not review on writ of error.

Thus it seems clear that the proposition raised by the first assignment of errors is untenable in all of its phases, and that the railroad company will not be granted by this court immunity from that part of the judgment below denominated as costs, interest on the judgment, and damages under the State supersedeas statute.

X.

Common-Law Jury.

It is observed that no objection was raised by the company to the installation of the jury, or to any inherent defect in the composition of the State court, with special reference to any infirmity in the agencies of that court, as measured by the Seventh Amendment to the Federal Constitution.

The subject-matter of the sixth assignment of error, in any possible bearing the same may have on the jurisdiction of the trial court, is briefly discussed above under the head of the jurisdiction of the trial court, page 13 and 14.

And the question of the alleged application of said Seventh Amendment to the trial in State courts of actions arising under the Federal Employers' Liability Act is separately treated in the joint brief of defendants in error in cases in this court at this term numbered 321, 399. 453, 473, 485, and 743.

Inasmuch as the verdict on which the judgment was entered was the unanimous verdict of a jury composed of twelve qualified jurors, the railroad company could not have been prejudicially affected either by the refusal of the trial court to grant the instruction proposed by it or by giving the instruction on the subject, both more particularly set forth in the sixth assignment of errors.

While it is believed that the action of the trial court in both particulars was correct, yet, in the absence of prejudicial error, the time of the court will not be consumed with further argument on the subject.

XI.

Comparative Negligence.

By the railroad's fourth assignment error is charged on the part of the Court of Appeals in not reversing the judgment by reason of the form of the fourth instruction of the trial court on the subject of comparative negligence.

Inasmuch as there was no evidence showing or tending to show that the deceased engineer was negligent, even in the slightest degree, the giving of any instruction whatsoever on the subject of contributory negligence tended to the prejudice of the administratrix and could not have operated to the injury of the railroad. The Court of Appeals could not have erred in this particular.

The language of the trial court's instruction on the subject at the second trial was identical with that contained in its instruction No. 4 at the first trial.

The railroad company at the second trial introduced no testimony on the subject of contributory negligence and proposed to the court no instruction upon the subject of comparative negligence. Neither did it point out to the court, either before the jury retired or in its motion for a new trial, any alleged defect in the instruction as given by the court on this subject.

The undisputed evidence was that at the time of the injury the deceased engineer was moving the train under obedience to and under constant signals from the conductor of the train.

It is deemed unnecessary, therefore, to further discuss this assignment; but the attention of the court is called to the extract from a recent decision of this court, pages 24-25 above, and also to our discussion of the identical instruction as given at the first trial, pages 26-27 above.

XII.

Demurrer to Evidence.

By the railroad's second and third assignments error is charged on the part of the Court of Appeals in not having reversed the judgment by reason of the failure of the trial court to grant the motion for a peremptory instruction in favor of the company.

To this proposition counsel devote twenty-eight pages of their brief, pages 12 to 40, inclusive, referring freely and extensively to the record of *both* trials.

In this purported résumé of the evidence the railroad company has forced counsel to choose between permitting the court to obtain an erroneous conception of the strength of their proof or to indulge in a like extended presentation of omitted parts of the record, the effect of which, however, would be a mere discussion of the weight of the evidence.

Our view of the assignments under discussion is aptly expressed by the Chief Justice in a recent decision of this court:

> "The first contention is based upon the refusal of a request made by the defendant to take the case from the jury by a peremptory instruction. Granting that, in its ultimate analysis, the request involved an appreciation of the Employers' Liability Act, nevertheless we are of opinion that the absolute want of merit in the proposition, in view of the state of the proof, caused the request, intrinsically considered, to be unsubstantial and frivolous as not to furnish any support for the contention that its refusal raised a question concerning the interpretation of the statute."
>
> Southern Railway *vs.* Gadd, 233 U. S., 572.

In the two trials of this action and in the three decisions rendered in the case by the Court of Appeals it has seemed to us that, in every instance where doubt has arisen in the

minds of the trial or appellate courts those doubts have been resolved in favor of the railroad company and against the dependents of decedent; and it is believed that this has been amply evidenced by what has gone before in this brief.

The question as to whether or not the state of facts presented by the evidence adduced was sufficient to warrant a submission of the case to the jury has heretofore been decided in the affirmative seven different times by the courts below whose spirit of fairness to the railroad company cannot be questioned.

To be more specific, the views of opposing counsel on this point have been presented to the trial court four times, namely, before verdict at each of the two trials and on motions for a new trial after verdict at each of two trials.

On appeal they have argued the matter three times before the Court of Appeals, twice on the first appeal and once on the second appeal.

Yet no judge, after reviewing the state of facts produced by the testimony, has ever brought his mind and judicial conscience to the position of holding that the dependents of decedent should be deprived of having their case go to the jury.

Under these circumstances counsel feel justified under this head in not entering into a detailed discussion of the evidence in the case, feeling sure that the court itself will review the record carefully before undertaking to overrule the seven decisions contrary to the contention of the railroad company that the evidence was not sufficient to justify the submission of the case to the jury.

In any review which the court may make of the record, among other things, it will be found that there are certain facts which are either undisputed or as to which evidence was undoubtedly introduced at the *second* trial amply sufficient to leave the matter of their determination to the jury, namely:

(*a*) The decedent was employed by the railroad company

as an engineer and was actually engaged as such in interstate traffic and commerce on September 5, 1908, when he sustained the injury.

(*b*) The injury was caused by the application from the outside at the rear of the train by the rear brakeman of an emergency air brake, producing a sudden, violent and unusual jar or jerk in the engine of sufficient force to throw the fireman off of his seat on the left side of the engine and to strike the shoulder and head of decedent against the engine hard enough to cause his death.

(*c*) The application of the emergency brake and the injury and death resulting therefrom were due to the negligence of the railroad company, its agents or employees other than decedent.

(*d*) Decedent was survived by dependents in the persons of his widow and three minor children, all of whom are represented in the action by his administratrix as plaintiff.

In reviewing the record it will be observed that the employees of the railroad company as witnesses, especially those under the odium of culpability, seemed bent upon conveying the idea to the jury that the emergency brake was frequently applied; but when pinned down they were compelled to admit that the application of the emergency brake was most infrequent as to any one train of cars, although in the aggregate of all the cars equipped with air brakes on the entire L. & N. Railway system or the railway systems of all the world, such brakes must be applied somewhere in the world every day.

The actual fact is, however, as testified by conductor Jones (as well as other witnesses) (R., 146), that the application of "the emergency is *not* a usual procedure; *it is an unusual procedure.*"

The effort was also made to minify, as far as possible, the effects of the application of the emergency brake; but the testimony as to the actual results of its application in this particular instance, when the train was moving slowly, the

testimony of employees of the railroad (other than Hill) as to the likelihood of damage to the train itself, to the effect that it could not be justified for the mere purpose of "bunching the slack" or preventing the obstruction of a crossing, is borne out and emphasized by the language of the rule of the company (R., 145), as shown by the following extract therefrom:

> "The emergency or quick action *must never be used unless* it is to avoid injury to *life or property. No excuse will be taken for its use except as stated.*" (Italics supplied.)

That the application of the air brake without warning, especially in violation of the rules, constitutes negligence within the meaning of the Employers' Liability Act is not only recognized by the Court of Appeals of Kentucky in both of its decisions in this case, but such ruling is in harmony with numerous other decisions, both State and Federal, in instances where injuries are sustained by employees of railroads as a result of unusual or unexpected and unnecessary jars or jerks which might appropriately have been avoided by the company or its other agents. C. & O. Ry. Co. *vs.* Savage, 150 Ky., 260, 263-4; Roberts' Injuries to Interstate Employees on Railroads, pp. 55-6, and cases cited.

And in such cases the jury is free to infer negligence even in the face of the testimony of other members of the train crew to the effect "that the train was handled in the usual and ordinary way without any unnecessary force or jar."

> Ft. Worth D. C. Ry. Co. *vs.* Stalcup (Texas Civil App.), 167 S. W., 279, and cases cited.

There was ample evidence to go to the jury on the subject of negligence of the company; and the refusal of the trial court to give the jury a peremptory instruction in favor of the railroad and the failure of the Court of Appeals to reverse the judgment by reason of its failure so to do, cannot supply any genuine basis for review by this court on writ of error under Sec. 237 of the Judicial Code.

G. N. Ry v. Knapp 240 U.S. (Mch 20/16)

XIII.

Preceding Negligence.

By the railroad's fifth assignment error is alleged on the part of the Court of Appeals in not reversing the judgment on the second trial by reason of the qualifying language used by the trial court in the concluding clause of its fifth instruction to the jury on the subject of negligence.

No objection is taken in this court to instructions numbered 1 and 3 or to the body of said instruction numbered 5 on the same subject.

These three instructions (R., 120-2) read in full as follows:

> "# 1. If the jury believe from the evidence that on the occasion in controversy, the defendant's agents and employees in charge of its train, or any of them did with negligence operate and manage the train upon which plaintiff's intestate was serving as engineer, so as to cause him to fall against the cab or engine, and injure him, and that he died as the natural and proximate result of said negligence, if any, they will find for the plaintiff."
>
> * * * * * * *
>
> "# 3. The court instructs the jury that under the rules of defendant company, it was the duty of the flagman, O. L. Hill, to apply the emergency air brake by the use of the angle cock on the rear of the train, *only when necessary to avoid injury to life or property;* and, if they believe from the evidence that at the time said Hill applied said emergency air brake, it was not necessary, nor believed by the flagman to be necessary in the exercise of a reasonable judgment in the prudent and careful operation of the train, to apply said emergency air brake, to avoid injury to life or property; and shall further believe from the evidence that plaintiff's intestate received the injury which resulted in his death, as the direct and proximate result of the application of said emer-

gency air brake, then they should find for the plaintiff."

* * * * * * *

"# 5. The court instructs the jury that when the plaintiff's intestate entered the service of defendant company as engineer, he assumed all the ordinary risks and hazards incident to that employment; and if the jury further believe from the evidence that flagman O. L. Hill stopped said train by the use of the air valve in the rear of the caboose, when it was necessary so to do, or when said flagman believed in the exercise of a reasonable judgment, in the prudent and careful operation of said train it was necessary so to do, in order to avoid injury to property; and further believed that said stoppage of said train naturally and proximately resulted in the injury, if any, to said Stewart, complained of in the petition, then the law is for the defendant and the jury shall so find; *unless, however, they shall further believe from the evidence that the necessity, if any, for the application of said emergency air brake, had been brought about by defendant's agents or servants, in the negligent operation of said train prior to the application of said brake, in which event they will find for plaintiff.*"

The part in italics in the last-mentioned instruction forms the sole foundation for the allegation of error.

In view of the admission of the rear brakeman Hill (R., 175) that he was moved "principally" by his action in applying the brake 120 feet away from the switch by the purpose "to bunch the slack on this occasion" and other positive evidences of negligence on the part of Hill, the aforementioned instructions of the trial court on the second trial were highly favorable to the railroad company and, if anything, prejudicial in their logical effect to the dependents of decedent, the administratrix on the second trial being embarrassed by the errors contained in the opinions of the Court of Appeals on the first appeal, as more particularly discussed in Part I of this brief in connection with her cross-writ of error.

Notwithstanding such embarrassments and the fact that the administratrix had to rely almost wholly upon the testimony of employees of the railroad company, the indisputable physical facts and the printed rules of the company are such that not only have unanimous verdicts been secured at each trial, but the Court of Appeals, after reviewing the evidence on appeal, has in each instance affirmatively found that there was negligence on the part of the railroad company.

The fact that the injury was caused through the negligence of the railroad company or any agent thereof other than decedent is sufficient; and there cannot have been committed any reversible error on the part of the Court of Appeals in not reversing the judgment of the trial court for any alleged error in the instructions on the subject of negligence.

Furthermore, the instruction proposed by the railroad company on that subject (R., 121) was clearly wrong; and the company's counsel, as in the case of the Illinois Central R. R. Company *vs.* Skaggs, 240 U. S., 66, sat silent when it became their duty under that decision to point out to the court at the trial wherein the instruction might, in their opinion, be corrected.

But, in view of the rules of the company, the physical facts and the indisputable evidence before the jury, it would have been error of a highly prejudicial character for the court to have attempted to give an instruction along the line of instruction 5 (R., 120-1) without some such qualifying clause as that in which, by the fifth assignment, the railroad company charges error.

Among the rules governing employees at the time of the injury were the following:

> "117. Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen; except where switch-tenders are stationed.
>
> "Whoever opens a switch shall remain at it until

it is closed, unless relieved by some other competent employee.

"Where there is more than one train to use a switch, it must not be left open unless one of the trainmen of the following train is at the switch and takes charge of it.

"117 (*a*). A train about to enter or leave a siding *must come to a full stop before the switch is thrown, and no signal must be given to start the train until the switch is turned and the lock is secured through the hasp.*

"No attempt should be made to close a switch until the last wheels are off the switch rails. The person who locks a switch must grasp the chain and pull the lock to see that it is securely fastened, and, after having done so, must look twice at the switch rails to see that they are in their proper position. *At meeting or passing points the employee attending the switch* will, after locking it to main track, take a *position* not nearer than ten feet from the switch *until the expected train has passed.*"

There was also a special rule governing the use of air brake, reading as follows:

"The emergency or quick action must never be used unless it is to *avoid injury to life or property. No excuse will be taken for its use except as stated.* The necessity for its use can be readily avoided by returning the handle to lap immediately after the release of the first application, and then applying the brakes lightly before the engine reaches the exact spot desired."

Here the rear brakeman had admitted decedent's northbound freight train onto the siding at the south switch at Cumberland, Tennessee, "a meeting or passing point," and he became and was "the employee attending the switch." After locking the switch, instead of taking *"a position* not nearer than ten feet from the switch until the expected train has passed," he goes up the straight main track several hundred feet without let or hindrance on the part of the con-

ductor, "responsible for the proper adjustment of the switches used by them and their trains," although the conductor, standing in the center of the main track, had full view of both ends of his train and, therefore, could necessarily have seen the rear brakeman after he proceeded north beyond the rear end of the train.

So standing, and presumably with actual knowledge of the fact that the rear brakeman was not at his post, and without first taking the necessary precautions incident to requiring the rear brakeman to regain his post at the south switch, the conductor gave orders to the engineer to move backward. The engineer, before doing so, complied with the rules by giving three distinct whistles; and the fireman likewise complied with the rules by taking hold of the rope and continuously ringing the bell. If the conductor intended to back onto the main line at the south switch, he was negligent in giving this order with knowledge of the fact that the rear brakeman had left his position at the switch. If the conductor did not intend to move the train onto the main track at the south switch and the facts and circumstances were such as that it was not negligence on his part to give the signal to back, then the rear brakeman had a right to infer and to expect that, between the point at which he applied the brake and the switch (some 120 to 130 feet), the conductor would cause the train to "come to a full stop before the switch is thrown."

Assuming, therefore, for the sake of argument but not otherwise, that there existed an emergency within the rule, the alleged emergency was clearly created by the preceding negligence of the company's own agents.

The attention of the court is also called to the following authorities bearing upon this branch of the case:

L. & N. Ry. *vs.* Street's Administratrix (Ky. Ap.), 129 S. W., 570.

Perkins *vs.* N. Pac. Ry. Co., 199 Fed., 712.

Transit Development Co. *vs.* C. Elec. S. D. Co., 194 Fed., 963.

Galveston, H. & S. A. Ry. Co. *vs.* Bosher (Texas Civ. Ap.), 165 S. W., 92.

K. C. So. Ry. Co. *vs.* Leslie (Ky. Apps.), 163 S. W., 83.

Penna. Ry. Co. *vs.* Goughnour, 208 Fed., 964.

L. & N. R. R. Co. *vs.* Gillian's Admx. (Ky. App.), 71 S. W., 863.

L. & N. R. R. Co. *vs.* Gordan (Ky. Ap.), 72 S. W., 311.

It was highly appropriate, therefore, that the jury should be given an opportunity to determine the question of fact as to whether or not there had been such negligent operation of the train prior to the application of the emergency brake as to bring about what occurred.

But there was no emergency. The alleged danger to PROPERTY "splitting the switch" was not immediate. Even so, Hogan testified that the same could have been repaired in four or five minutes, and said, "I would let any train on earth back up through any switch before I would open an angle cock on an engineer" (R., 200-1). See also Evidence of Minor (R., 46-47); Jones (R., 87); Suttle (R., 85); Neill (R., 82); Sharpe (R., 95).

Thus it is clear that the qualifying clause of the instruction was made necessary and appropriate by the peculiar facts in the case; and that under no view of the matter, in the face of affirmative evidence of negligence on the part of the railroad company in the premises, could the action of the Court of Appeals of Kentucky in not reversing the judgment on this ground be found reversible error.

XIV.

No Error on Second Trial Prejudicial to Company.

We have shown in Part I of this brief that the errors committed by the Court of Appeals in reversing the judgment obtained at the *first* trial, as more particularly set forth in the assignments of error in support of the cross-writ of error, were highly prejudicial to the administratrix and that the original judgment for $20,000 should be reinstated, in which event the judgment obtained at the second trial would be eliminated as a matter of course.

We have shown in Part II of this brief that no errors were committed by the Court of Appeals prejudicial to the railroad company in its action affirming the judgment obtained at the *second* trial.

On the contrary, errors were committed by the trial court at the second trial which were highly prejudicial to the interests of the administratrix. So much so that the only way this court, under the peculiar circumstances of the case, can accord to the dependents of decedent that relief to which they are entitled is to reinstate the judgment entered at the first trial because in the unequal test of endurance between them and the railroad company in its plan of endless litigation, she has been forced to refrain from seeking a *third* trial, even in the face of the most flagrant disregard of her rights in the second trial, namely:

1. By allowing the railroad company to amend its answer (R., 111) so as to aver the payment on the life of decedent of insurance amounting to $5,000; and

2. By permitting the railroad company at the second trial (R., 134 *et seq.*) to introduce testimony showing the collection by the widow of something over $5,000 insurance on the life of decedent, no part of which was contributed to or paid by the railroad company.

In addition to this, acting under the instructions of the Court of Appeals in its judgment of reversal of the first judgment, the trial court at the second trial also gave instructions on the measure of damages the effect of which was to exclude damages for the loss of services of decedent to the extent of "that care, counsel, training, and education which" the children "might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation," as is referred to above in connection with the discussion of the cross-writ of error (pp. 27-30).

Furthermore, the dependents of decedent suffered at the second trial as a result of the erroneous instructions of the Court of Appeals requiring an apportionment of the verdict, to the extent of having to try out before the jury in this action matters with which the railroad company had no concern—all contrary to the requirements of the statute as construed by this court and more particularly discussed above in connection with the cross-writ of error (pp. 20-24).

It is not surprising, therefore, that the amount of the verdict on the second trial was very much reduced as compared with that of the first trial.

Thus it is clear that, instead of the errors committed by the trial court at the second trial being prejudicial to the railroad company, such errors as were made by or reflected through the trial court at the second trial were highly prejudicial to the dependents of decedent.

Conclusion.

In conclusion it is respectfully urged that the court should sustain the cross-writ of error as sued out by the administratrix and give proper direction for the reinstatement of the judgment for $20,000 and costs rendered at the first trial.

Should the court, however, fail to sustain said writ of error and reinstate said judgment, it is respectfully urged that the

writ of error as sued out by the railroad company should not be sustained, but that the facts and circumstances in connection therewith render it highly appropriate that this court should impose damages upon the railroad company under Rule 23.

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ADDENDUM.

Reply Brief of Railroad.

Lest the court may be misled by the apparent misconception by opposing counsel of our position, brief reference to their brief seems appropriate.

"Crucial Error—Apportionment of Verdict."

Our contention was that the first judgment was not defective or reversible because based upon a verdict *in solido;* and that the action of the Court of Appeals in so construing the Federal statute was reversible error. See pages 20-24, 27, 28, above.

Our idea is that this was the crucial error and accounts for the reversal on first appeal, and which is borne out by the following:

The court specifically found in its first opinion (R., 104-109):

(*a*) That, according to the Kentucky practice, the specific acts of negligence did not have to be plead; and that, therefore, the demurrer of the railroad company was rightly overruled.

(*b*) That *"the motion for a peremptory instruction was properly overruled,"* negligence on the part of the company being pointed out by the court.

(*c*) That, by instruction No. 3 (R., 26) the damages were clearly *confined to pecuniary damages;* and by the decision on rehearing (R., 109) the court admitted that, in making the criticisms contained in its original opinion, it had overlooked "that this case was tried under the Federal Employers' Liability Act, and * * * the Kentucky rule as to the measure of damages was incorrectly directed to be given on another trial."

(*d*) That the Court of Appeals did not consider the giving on the first trial of instruction No. 4 (R., 26) on contributory negligence as reversible error is demonstrated by the fact that at the second trial, on the same state of facts in that regard, *the identical language* was used by the trial court in its instruction No. 4 (R., 120); yet the *judgment was affirmed* on the second appeal.

It is immaterial, however, whether or not the measure of damages was included with the apportionment of the verdict as a cause of the judgment of reversal, as our assignments of error on cross-writ of error are ample for a review here.

Measure of Damages.

On the measure of damages the third assignment (R., 26) at the first trial confining the verdict as it did to pecuniary damages, certainly contained no error prejudicial to the railroad company, as further discussed above, pages 27-30.

The railroad company's reply brief, pages 7-8, asserts that we admit that the instructions given by the trial court were not correct under the Federal act. What we do say is that instruction No. 3 sounds in pecuniary damages and is in sub-

stantial compliance with the Federal statute, except that it unduly limited recovery; and, therefore, to the extent there was error at all, the same tended to the prejudice of the administratrix and not to the prejudice of the railroad company.

For this and other reasons indicated the railroad company was in no position to complain of the instructions covering this point.

Reinstatement of First Judgment.

In direct opposition to the facts just stated in (*a*) and (*b*), the railroad company insists (pages 3-4) that the Court of Appeals held—

> "that the jury should have been peremptorily instructed to find for defendant for lack of evidence that it was negligent."

In the face of general instruction No. 1 (R., 25) on the subject of negligence, it is also suggested that there was no instruction including the negligence of the conductor, Jones, and the remarkable proposition is advanced that a retrial was essential for the purpose of having the jury pass on the negligence of Jones, whereas the court itself found that the evidence adduced was sufficient to show his negligence.

The fact that the testimony of Jones was not introduced at the first trial and that no special instruction was proposed by the railroad company on the subject of his negligence are among the things for which the company itself is responsible. It is also interesting to note that it did not place Jones on the stand at the second trial and that no special instruction was offered by the company (R., 121) at the second trial on the subject of the negligence of Jones.

The failure of the railroad company to assign its alleged error on the part of the Court of Appeals in finding affirmatively that *"the motion for peremptory instruction was*

properly overruled (R., 108) by the trial court at the first trial, aside from the difficulty due to its not being a Federal question, closes its mouth from the assertion now that a retrial is necessary upon a reversal of the errors assigned by the administratrix in her cross-writ of error.

The proper form of the judgment on the cross-writ of error will be to reverse and remand "with instructions to reinstate the judgment entered" in the trial court on April 11, 1912, and which should be "affirmed."

Jones National Bank *vs.* Yates *et al.*, 240 U. S. (decided April 3, 1916).

Campbell *vs.* N. W. Eckington Imp. Co., 229 U. S., 561, 585, and other cases cited, pages 15-17 above.

Railroad's Writ of Error.

Res Ipsa Loquitur.

In the case of Great Northern Ry. Co. *vs.* Wiles, 240 U. S., —, decided March 20, 1916, this court says:

> "The application of the doctrine to cases like that at bar (an Employers' Liability Act case) is disputable. * * * We, however, do not have to go further than *to indicate the dispute.*"

The railroad company, in its original brief, page 16, says: "The doctrine *res ipsa loquitur* is not applicable."

Averment and Proof of Insurance.

The contention, page 16 of company's reply brief, is untenable.

The apportionment in the same action was both unnecessary and injurious to defendants, pages 20 to 24 above.

And the introduction of the element of insurance was highly prejudicial to defendants (pages 51-52 above).

Seven Decisions Below Should Not Be Disturbed.

In the case of Great Northern Railway Co. *vs.* Knapp, 240 U. S. (decided March 20, 1916), is aptly described the situation of the company in this case on the subject of peremptory instructions:

> "The case, then, is one in which there is no question as to the interpretation of any provision of the Federal act or as to the definition of legal principle in its application, but simply involves an application of all the facts and admissible inferences in the particular case for the purpose of determining *whether there were matters for the consideration of the jury. The State courts, trial and appellate, held that there were.* Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is *palpable*" (italics supplied).

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 453.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES R. GAINEY, Jr., ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF RICHARD DWYER, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 5, 1915.

(24,705)

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1 COMMONWEALTH OF KENTUCKY:

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 29th Day of January, A. D. 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Appeal from the Boyd Circuit Court.

Be it remembered that heretofore on the 21st day of August, 1913, and on the 12th day of December, 1914, the appellant, the Chesapeake & Ohio Railway Company, by its counsel filed in the Clerk's office of the Court of Appeals of Kentucky transcripts of record on appeals in the above styled case, which transcripts contain the following Pleadings, Orders, Bill of Exceptions, etc., ordered to be copied for the Supreme Court of the United States by the præcipe filed by the appellant and plaintiff in error in said case, to-wit:

2 Pleas Before the Hon. W. C. Halbert, Judge of the Twentieth Judicial District of Kentucky and Sole Judge of the Boyd Circuit Court, at the Court House, at Catlettsburg, on the 20th day of March, 1913.

Be it remembered that on the 21st day of February, 1911, the plaintiff, Sarah Dwyer, Administratrix of the estate of Richard Dwyer, deceased, produced and filed in the Clerk's office of the Boyd Circuit Court, her original petition, against the Chesapeake & Ohio Railway Company, Defendants, and upon the back of which petition appears the following endorsement:

"Filed February 21st, 1911. Summons and copy issued.
PAUL POAGE, *Clerk.*
By S. M. WYLIE, *D. C.*

Said petition is in words and figures following, to-wit:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Petition.

The plaintiff, Sarah Dwyer, says that Richard Dwyer departed this life intestate on the 12th day of May, 1910, while a resident

of and domiciled in Boyd County, Kentucky; and, that on the 8th day of June, 1910, she was by the Boyd County Court duly appointed administratrix of the estate of Richard Dwyer, gave bond and qualified according to law, and is now acting as such, and that said decedent left surviving him who were dependent upon him
3 for their support and maintenance a widow and children.

That the defendant, The Chesapeake and Ohio Railway Company, is a corporation created and organized under the laws of the State of Virginia, with power to sue, be sued, contract and be contracted with as a natural person, and with the power to run and operate a line of railway from and through the States of Virginia, West Virginia, to and through the State of Kentucky, and was and is a common carrier of both passenger- and freight, and was at the time of the wrongs and injuries hereinafter complained of engaged in carrying freight and passengers into and between the different States and was at the said time engaged in interstate commerce.

She states that on said date, to-wit: the 12th day of May, 1910, while her said decedent, Richard Dwyer was in the employment of the defendant and working and laboring for it as an engineer on one of its engines pulling with said engine its train of cars loaded with freight and being hauled and carried by it from this State to others and while he was engaged in interstate commerce for the defendant hauling and pulling said train of cars as aforesaid from Pikeville, Pike County, Kentucky, to and through Boyd County, Kentucky, to other states he was by the gross negligence and carelessness of the defendant, its agents and servants in charge of said train and engines, injured and killed.

She states that on the right of way of the defendant South of the City limits of the City of Catlettsburg, in Boyd County, Kentucky, where its said line of road runs and over which said decedent was operating the engine with its train of cars, aforesaid, the defendant in building its said line of road had made a deep cut about thirty (30) feet in depth, and in making said excavation and cut aforesaid to build and lay its road and tracks thereon it left upon the side of said cut and excavation about thirty (30) feet high above
4 the said tracks and road a large rock dangerously overhanging the track.

She says that on said night of the 12th day of May, 1910, the said rock with a large lot of graval, dirt and earth and other rock, in and near same, fell from said side of said excavation into the tracks of the defendant, aforesaid, and that while he was operating said engine, train and cars in the rear of an engine in front of his aiding and assisting in pulling said train of cars, ran into and upon said rock, earth and stone with said engine train and cars, aforesaid, thereby causing same to turn over and fall upon him thereby injuring and killing him as aforesaid.

She further says that said defendant, its agents and servants in charge of said road bed and tracks whose duty it was to look after, repair and keep same in a safe condition knew that said rock was hanging upon the side of said excavation in a dangerous condition and likely at any time to fall down upon said right of way and

racks, thereby endangering the lives of the employees operating engines and trains over and upon said track, in time to have prevented said injury and death of said decedent, but negligently and carelessly failed to use care to remove same from said place, and thereby caused the death of said decedent, or by the exercise of ordinary care on their part could have known of same in time to have prevented the injuries and death of said decedent, but negligently and carelessly failed to do so, and that by reason of same caused the death of said decedent, aforesaid.

She says that in front of and attached to the engine which was being operated by her decedent on said occasion was another engine assisting in pulling the train of cars aforesaid, and which was being operated by an engineer and fireman in the employment of the said defendant, and that the injuries and death of her said decedent occurred in the night time about 11 o'clock p. m. on said date at a time when it was dark; and that the equipment of said engines were defective in equipment in this; that the defendant failed to furnish and supply them with good and sufficient headlights so as to enable the employees thereon to see obstructions on the track in front thereof; that the lights furnished and supplied said engines by said defendant were insufficient and defective and would not and did not furnish sufficient light to safely operate them on said occasion, and that the defendant knew that said lights were insufficient, defective and not sufficient to operate said train and cars in the night time safely, but that her decedent did not know of same, and that said defective and insufficient lights contributed to and caused the injuries and death of decedent aforesaid.

She says that by reason of all of which she has sustained damages in the sum of Forty Thousand Dollars ($40,000.00).

Wherefore, she prays judgment against the defendant for damages in the sum of Forty Thousand Dollars ($40,000.00) for costs and all proper relief.

DINKLE & PRICHARD,
Attorneys for Plaintiff.

The plaintiff, Sarah Dwyer, says that the statements in the foregoing petition are true as she verily believes.

—— ——.

Subscribed and sworn to before me by Sarah Dwyer, this the — day of ——, 1911.

My commission expires on the — day of ——, —.

—— ——,
Notary Public in and for
Boyd County, Kentucky.

6 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 18th day of March, 1913, the following order was made:

Order Noting Answer.

SARAH DWYER, Adm'x, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The defendant this day produced its answer herein, which is filed.

Said answer is as follows, to-wit:

Answer.

SARAH DWYER, Adm'x of Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Comes the defendant and for answer to the petition of plaintiff herein, it denies, that he was injured or killed by the gross or any negligence or carelessness of this defendant, or its agents or servants in charge of said train or engine. It denies that defendant, or its agents or servants in charge of said train or said engine, were grossly or at all negligent or careless. It denies that defendant's line of railway at the point where the accident described in the petition occurred, is located in a cut 30 feet in depth, or that said cut is of a greater depth than 10 feet. It denies that it left on the side of said cut a large or any rock, or that same was dangerously or
7 at all overhanging the track. It denies that defendant, or its agents or servants in charge of defendant's roadbed or track knew in time to have prevented the injury to, or death of, decedent, or at all, that said alleged rock was hanging on the side of said excavation, or that same was in a dangerous condition or likely to fall upon said right of way or tracks, or to thereby or at all endanger the lives of defendant's employees operating engines or trains over or upon said track, or that defendant, or its said agents or servants negligently, or carelessly, or at all, failed to use care to remove same from said place, or by reason of said alleged failure caused the death of decedent. It denies that it, or its said agents or servants, by the exercise of ordinary or any care on their part, could have known of the alleged presence of said rock in time to have prevented the injuries to, or death of decedent. It denies that it, or its said agents or servants negligently, or carelessly, or at all, failed to do so, or that the death of said decedent resulted from any negligence or carelessness on the part of this defendant, or its agents or servants. It denies that said rock was hanging on the side of said excavation, or that same was in a dangerous condition, or that same was liable at any time, or at all, to fall down upon said right of way or tracks, or that same endangered the lives of defendant's employes operating engines or trains over or upon said track. It denies that defendant knew of said alleged condition or could, by the exercise of ordinary

care, have known same. Defendant denies that the equipment of said engines hauling the trains described in the petition, or either of them, were defective in their equipment. It denies that it failed to furnish or supply good or sufficient headlights. It denies that
8 the lights furnished or supplied said engines were insufficient or defective or that same would not, or did not, furnish sufficient light to safely operate same on the occasion of the accident and injury complained of in the petition. It denies that it knew that said lights were insufficient or defective, or that decedent did not know of same. It denies that said alleged defective or insufficient lights contributed to or caused the injuries or death of the decedent. It denies that plaintiff has been damaged in the sum of $40,000.00 or any other sum. Wherefore &c.

Par. 2. Defendant further answering states that at the time and on the occasion complained of in the petition, plaintiff's decedent was himself guilty of negligence which contributed to said accident and injury, and but for such contributory negligence on his part, said accident would not have happened nor the injuries have been received, nor his death have occurred. Wherefore, defendant pleads and relies on the above facts in bar of plaintiff's right to recover in this action.

Par. 3. Defendant further answering states that the plaintiff's intestate was an employe of this defendant, and that in entering and remaining in the service of this defendant, he assumed certain risks and dangers incident to said service; that by his contract of service with this defendant he assumed all the ordinary risks and dangers incident to his said employment, among which was the risk of injury set up in the petition. Defendant states that the danger of injury resulting from the falling of dirt or rock upon defendant's track at the time and place of the accident described in the petition, was a risk assumed by the plaintiff in entering the employment of defendant as incident to his service and to the operation of railroad trains; that the falling of said dirt or rock on defendant's
9 track, and the resulting derailment of the train or engine upon which decedent was working, could not have been avoided by the exercise of ordinary care or skill on the part of defendant, or its agents or servants; that the said derailment of said train was a risk assumed by the decedent as a part of the terms of his employment; that decedent was acquainted with the fact of said cut and with the danger, if any, of dirt or rock falling therefrom, that the danger of accident and injury therefrom was open, obvious and known to decedent before and at the time of his injury. Defendant further states that the headlights upon the engines described in the petition were such as he was entirely familiar with; that the alleged defective or insufficient condition of said headlights, if any, and the danger of accident or injury therefrom, were open and obvious and known to plaintiff before and at the time of his injury. Defendant states that as and for a part of the terms of his employment, the decedent assumed the risks of injury from the foregoing dangers, and it pleads and relies on the facts herein set up as a bar to plaintiff's right to recover damages herein.

Wherefore, having fully answered, defendant prays that it may be hence dismissed, with its costs herein expended.

WORTHINGTON, COCHRAN & BROWNING,
Counsel for Defendant.

10 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 18th day of March, 1913, the following order was made:

Order Noting Reply.

SARAH DWYER, Adm'x, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced her reply, herein which is filed.

Said reply is as follows, to-wit:

Reply.

SARAH DWYER, Adm'x of the Estate of Richard Dwyer, Deceased, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Par. 1. The plaintiff, for reply herein, denies that at the time or on the occasion complained of in the petition, plaintiff's decedent was himself guilty of negligence, or that such negligence contributed to said accident or injury, or that but for such contributory negligence on his part said accident would not have happened nor the injuries have been received, nor his death have occurred.

11 Par. 2. Plaintiff denies that in entering or remaining in the service of defendant her intestate assumed certain risks or dangers incident to said service, or that by his contract of service with the defendant he assumed all or any of the ordinary risks or dangers incident to the saie employment, or among which was the risk of injury set up in the petition. Defendant denies that the danger of injury resulting from the falling of dirt or rock upon defendant's track at the time or place of the accident described in the petition was a risk assumed by plaintiff in entering the employment of defendant, or as incident to the service or to the operation of railroad trains.

Plaintiff denies that the falling of said dirt or rock on defendant's track and the resulting derailment of the train or engine upon which decedent was working could not have been avoided by the exercise of ordinary care or skill on the part of the defendant, or its agents or servants, or that the said derailment of said train was a risk assumed by the decedent as a part of the terms of his employment, or that decedent was acquainted with the fact of said cut, or with the

danger of dirt or rock falling therefrom, or that the danger of accident or injury therefrom was open or obvious, or known to decedent before or at the time of his injury.

Plaintiff denies that the headlights upon engines described in the petition were such as decedent was entirely, or at all, familiar with, or that the defective or insufficient condition of said headlights or danger of accident or injury therefrom were open, or obvious, or known to plaintiff before or at the time of his injury. Plaintiff denies that as or for a part of the terms of his employment the decedent assumed the risks of injury from the said dangers, or any of them.

Wherefore, plaintiff prays as in her petition.

GEO. B. MARTIN,
DINKLE & PRICHARD,
Attorneys for Plaintiff.

12 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 19th day of March, 1913, the following order was made:

Trial.

SARAH DWYER, Adm'x Richard Dwyer, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The parties this day appeared by their attorneys, thereupon came a jury, to-wit: David Rucker, G. S. T. Griffith, James Reynolds, James B. Dixon, Milt Rice, Samuel Cyrus, Wm. Gray, John A. Plaffenberger, Andy Scott, I. S. Collins, John P. Creighton, John Fowler, who were duly sworn to try the issue, and having heard the evidence in full, and being unable to complete the trial, were admonished by the Court and adjourned until 9 o'clock tomorrow morning.

At a Circuit Court Began and held for Boyd County, at the Court House in Catlettsburg, on the 20th day of March, 1913, the following order was made:

Judgment.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

13 The jury sworn herein on yesterday, the 9th day of the present term, this day reappeared in their seats, and having received the instructions of the Court, and having heard the argument of counsel, retired to their room to consider of a verdict, and later returned into the Court room with the following verdict, viz:

"We, the jury, agree and find for the plaintiff the sum of Fourteen Thousand Dollars, $14,000.00.

(Signed) JNO. P. CREIGHTON,
One of the Jury."

It is therefore adjudged by the Court, that the plaintiff, Sarah Dwyer, Administratrix of the estate of Richard Dwyer, deceased, recover of the defendant, The Chesapeake and Ohio Railway Company, the sum of Fourteen Thousand Dollars ($14,000.00) with interest thereon at the rate of 6% per annum from the 20th day of March, 1913, until paid and her costs herein duly expended.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 21st day of March, 1913, the following order was made:

Order Noting Motion and Grounds for New Trial.

SARAH DWYER, Adm'x., etc., Plaintiff,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

This day came the defendant and produced and filed its motion and grounds for a new trial herein, and the Court being sufficiently advised, it is ordered that the same be and it is hereby over-
14 ruled, to which the defendant excepts, and prays an appeal to the Court of Appeals, which is granted accordingly; and upon motion of the defendant it is given until and including the tenth (10th) day of the next April Term of this Court within which to prepare and tender its Bill of Exceptions herein.

Said Motion of Grounds for new trial are as follows, to-wit:

Motion and Grounds for New Trial.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

The defendant, Chesapeake and Ohio Railway Company, moves the Court to set aside the verdict and judgment herein and grant it a new trial upon the following grounds to-wit:

1st. The verdict is contrary to law.
2nd. The verdict is not supported by the evidence.
3rd. The amount of damages is excessive and so much as to indicate that it was the result of passion and prejudice.
4th. The Court erred in admitting irrelevant and incompetent testimony offered by plaintiff, which was objected to at the time by plaintiff.

5th. The Court erred in refusing to admit competent and relevant testimony offered by defendant.

6th. The Court erred in refusing to grant defendant's motion for peremptory instruction made at the conclusion of plaintiff's testimony.

15 7th. The Court erred in refusing to grant defendant's motion for a peremptory instruction made at the conclusion of all testimony.

8th. The Court erred in giving instructions marked 1, 3, 4 and 5.

To each of the errors complained of defendant excepted at the time each was made.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for the Defendant.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 6th day of May, 1913, the following order was made:

Order Filing Bill of Exceptions.

SARAH DWYER, Adm'x of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

This day came the defendant and produced and tendered its Bill of Exceptions herein, and same having been examined and found to be correct, it is now ordered that same be filed, and signed, sealed, approved and made a part of the record herein, without being spread at large upon the order book, all of which is accordingly done.

16 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky on February 25, 1914, the following orders and judgments were entered, to-wit:

Judgment of Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from the Boyd Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for a new trial consistent with the opinion herewith. Which is ordered to be certified to said Court.

It is further considered that appellant recover of appellee its costs herein expended.

At the same time, to-wit, February 25, 1914, the Court of Appeals of Kentucky delivered the following opinion, to-wit:

17 Court of Appeals of Kentucky, February 23, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from the Boyd Circuit Court.

Opinion of the Court by Judge Settle, Reversing.

Richard Dwyer, who was a locomotive engineer in the employ of the appellant, Chesapeake & Ohio Railway Co., was killed May 12, 1910, at England Hill in Boyd County, Kentucky, by the derailment of a part of a train upon which he was at the time employed as such engineer. The train was a freight train, being operated by two engines, the second engine being the one of which the decedent had charge.

At the place of the accident the railroad track is located in a cut the banks of which arise in height several feet above that of a train. The accident was caused by a land-slide from one side of the cut, which caused rocks and earth to be deposited upon the track in such quantities that when struck by the moving train the two engines and several cars thereof were derailed and the decedent, being thrown under the engine of which he was in charge, received injuries which shortly thereafter resulted in his death. This action was brought by the appellee, Sarah Dwyer, the widow of the decedent and
18 administratrix of his estate, to recover of appellant damages for his death, the recovery being sought under the act of Congress known as the "Employers' Liability Act," approved April 22, 1908, as amended by the act of April 5, 1910; the petition averring the facts necessary to bring the action within the purview thereof. There were three grounds of negligence alleged, first, negligence of appellant's servants, other than the decedent, in charge of the train, in the manner operating same; second, negligence of the appellant in failing to equip the engines with sufficient headlights; third, negligence of the appellant and its servants in failing to take the proper precautions to prevent the fall of debris upon the railroad track at the place of the accident. We gather from the record, however, that the third ground of negligence mentioned was the only one relied upon for the recovery; and in support thereof evidence was introduced by appellee which strongly conduced to prove that the side of the cut from which the land-slide came had, for some months prior to the accident, been in a more or less dangerous condition because of the presence of overhanging rocks and loose dirt, which gave notice to appellant of the danger to be apprehended from a land-slide and of the necessity of taking such precautions as, by the use of ordinary care could have been employed to prevent the same, and which, if employed, would have prevented

the accident and consequent death of the decedent. On the other hand, in support of the denials of negligence contained in its answer, appellant introduced considerable evidence to the effect that the side of the cut gave no indication of danger or of the probability of a land-slide; and further, that the accident could not have been anticipated or prevented by it.

The trial resulted in a verdict and judgment in appellee's favor for $14,000 damages. Appellant was refused a new trial, hence this appeal.

It is not contended by appellant's counsel that the verdict was not authorized by the evidence, but it is insisted by them that the judgment should be reversed because of error committed by the trial court in instructing the jury as to the measure of damages. The instruction on that subject is as follows: "The jury are instructed that if they should find for the plaintiff, then they will from the evidence find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate the estate of the decedent, Richard Dwyer, for the destruction of his power to earn money, caused by his death, not exceeding, however, the sum of $40,000, the amount claimed in the petition." Counsel concede that the instruction correctly states the measure of damages applicable to actions for death brought under section 6, Ky. Statutes, but contend that it is not applicable to actions brought under the Federal Statute, arguing that the damages recoverable under the latter statute are not such as will compensate the estate of the deceased employee for the destruction of his power to earn money, but such as will compensate his surviving relatives for the actual pecuniary loss resulting by reason of his death to the particular person or persons for whose benefit the statutory right of action is given. We are constrained to sustain this contention, indeed, in effect, have heretofore done so in the case of I. C. R. R. Co. vs. Doherty's Adm'r, 153 Ky., 363, in which a recovery was refused the administrator of an employee of the railroad company alleged to have been killed, while engaged in interstate commerce, by the negligence of its servants in operating one of its trains, because of the failure of the petition to allege, and of the evidence to show, that the deceased employee left surviving him a beneficiary or beneficiaries in whose behalf the recovery could be had. In the opinion we said:

"It is clear that the act does not like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It, therefore, expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz; the beneficiaries named, in the order named. This being so, it necessarily follows that in an action under the act of Congress if there is no one for whom a recovery can be had, there can be no recovery.

Proof must, therefore, be made of the existence of such sur-
21 viving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So, if the petition in such an action fails to allege that the decedent is survived by a person or persons coming within the indicated limitation, it is bad on demurrer."

This question seems to have been authoritatively settled by several recent decisions of the Supreme Court of the United States, declaratory of the liability imposed by the act in question and the measure of recovery thereunder, and we will now consider some of these cases. In Mich. Cent. R. R. Co. vs. Vreeland, 227 U. S., 59, (decided January 20, 1913), a recovery was sought under the federal statute for the widow of an employee who was killed by the railroad company while engaged in interstate commerce. In the opinion it is said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: 'or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such
22 injury or death,' etc." * * *

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only." * * *

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. chap. 93, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England, has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation pecuniarily resulting to them from his wrongful death." * * * "The word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."

23 "A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judi-

cially, not only to express the character of that loss to the beneficial plaintiffs, which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation. Patterson, Railway Acci. Law, sec. 401."

In the yet more recent case of G. C. & S. F. Ry. Co. vs. McGinnis, 228 U. S. 173, which was an action for the death of an employe caused by the negligence of the railroad company brought under the Federal statute in a state court of Texas by his widow, as administratrix, for her benefit and that of their four children, one of the latter being a married daughter residing with her husband; it was held both by the trial court and the Court of Civil Appeals, that the statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him or had the right to expect any pecuniary assistance from him. In passing on this ruling the Supreme Court of the United States in the opinion delivered said:

"This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of
24 cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. Michigan C. R. Co. vs. Vreeland, 227 U. S. 59; American R. Co. vs. Didricksen, 227 U. S. 145. In the last cited case, speaking of the employers' liability act, we said:

" 'The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained.' "

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount,
25 the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

It is manifest from the authorities, supra, that the trial court did not, by the instruction quoted in the opinion, correctly advise the jury as to the measure of damages. The recovery should have

been confined by the instruction on the measure of damages, in the event of a finding for the plaintiff, to such a sum in damages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence might show they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant, if it was so caused; and after thus finding for the plaintiff a sum sufficient to compensate all the beneficiaries named, it should have been apportioned by the jury among the beneficiaries, stating in their verdict how much, if anything, they find for each of them; the damages altogether not to exceed the amount claimed in the petition. It is not apparent from the record before us, however, that the court could have intelligently instructed the jury at all on the measure of damages for the petition only alleges that "said decedent left surviving him, who were dependent upon him for their support
26 and maintenace, a widow and children." It is nowhere stated in the petition how many children there were or the age of any of them; and the evidence, strange to say, is wholly silent on the subject of the children. We must take it for granted that there were children, because the averment in the petition to that effect is not denied by the appellant's answer. So, in view of the failure of the petition to state, and of the evidence to show, the number of children and also their dependence upon the decedent, while living, for maintenance, it would have been practically impossible under the circumstances for the court to have guided the jury by a proper instruction on the question of the damages to be awarded.

Our attention has been called by the brief of appellee's counsel to the case of L. & N. R. R. Co. vs. Stewart's Adm'x, 156 Ky, 550, brought under the Federal statute, an expression in the opinion of which apparently approves such an instruction on the measure of damages as that complained of in the instant case. It is only necessary to say that the inadvertent statement referred to, has been corrected in response to a petition for a rehearing filed in the case, and, that as modified by the response, the opinion does not conflict with the conclusion expressed in this case.

It is insisted for appellee that, as appellant did not on the
27 trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and, as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. I. & E. Ry. Co. vs. Crawford, 155 Ky., 723; South Cov. & C. St. Ry. Co. v. Core, 29 R. 836.

Because of the error of the trial court in failing to properly instruct the jury on the measure of damages, the judgment is reversed and cause remanded for a new trial consistent with the opinion.

Worthington, Cochran & Browning, Maysville, Ky., for Appellant.
Dinkle & Prichard, George B. Martin, Catlettsburg, Ky., for Appellee.

(Endorsed:) Feb. 25, '14. C. & O. vs. Dwyer's Adm'r'x.

28 Afterwards on the 2nd day of April, 1914, the mandate of the Court of Appeals of Kentucky issued on the foregoing judgment in words and figures following, to-wit:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, February 25, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
against
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from a Judgment of the Boyd Circuit Court.

The Court being sufficiently advised is seems to them the judgment herein is erroneous.
It is therefore considered that said judgment be reversed and cause remanded for a new trial consistent with the opinion herein.
Which is ordered to be certified to said Court.

ROBT. L. GREEN, *C. C. A.*,
By A. ADDAMS, *D. C.*

29 SARAH DWYER, Adm'x, &c., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced her amended petition herein which is filed.
Said amended petition is as follows:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Plaintiff, for amendment to her petition herein says that the averment in her original petition that decedent, Richard Dwyer, left surviving him children dependent upon him for support and maintenance was a mistake and is hereby withdrawn.
Plaintiff says that the only child left surviving said decedent was

married at the time of his death and was not dependent upon him for her maintenance and support. Plaintiff says that she, this plaintiff, is and was the sole dependent surviving beneficiary of the cause of action herein set forth under the Federal Employers' Lia-
30 bility act; that at and before the time of the decease of Richard Dwyer, she was his wife; was — years of age at the date of his death, and was at said time and theretofore solely and entirely dependent upon said decedent for her maintenance, livelihood and support; that by reason of his death, she, as beneficiary, was and is damaged and has suffered pecuniary loss in the sum of forty thousand Dollars.

Wherefore, plaintiff prays for judgment as in her original petition.

DINKLE & PRICHARD AND
GEORGE B. MARTIN,
Attorneys for Plaintiff.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 24th. day of June, 1914, the following order was made.

31 SARAH DWYER, Adm'r'x of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced in open Court the Mandate of the Court of Appeals herein, which is filed and ordered to be recorded, and is as follows:

Copied on page 28 of this record.

32 SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

By agreement of the parties hereto, it is ordered that the affirmative allegations of plaintiff's amended petition filed herein, be now traversed of record.

At a Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 24th. day of June, 1914, the following order was made.

SARAH DWYER, Adm'r'x of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The parties this day appeared by their attorneys, thereupon came a jury to wit: Stephen Bryant, Lewis Rowe, William Caveron, Joseph Stewart, Hugh Faulkner, A. T. Gilley, William Williams,

Almon Darby, J. L. Rucker, T. R. McGlothlin, E. V. White, J. M. Standley, who were duly sworn to try the issue, and having
33 heard the testimony on behalf of the plaintiff, and being unable to complete the trial, were admonished by the Court and adjourned until 9 o'clock tomorrow morning.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 25th. day of June, 1914, the following order was made.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The jury sworn herein on yesterday, the 15th. day of the present term, this day reappeared in their seats in the jury box and having heard the testimony in full, and received the instructions of the Court, and having heard the argument of counsel retired to their room to consider of a verdict, and later returned into the Court room with the following verdict, to-wit:

34 "We, the undersigned jurors agree and find for the plaintiff, in the sum of $16,000 sixteen thousand dollars."

JOE STEWART.
S. H. BRYANT.
ALMON DARBY.
HUGH FAULKNER.
LOUIS ROWE.
J. L. RUCKER.
T. R. McGLOTHLIN.
WILLIAM CAVERON.
A. T. GILLEY.

It is therefore adjudged by the Court that the plaintiff Sarah Dwyer, Administratrix of Richard Dwyer, Deceased, recover of the defendant, Chesapeake & Ohio Railway Company, the sum of sixteen thousand ($16,000.00) Dollars, with interest thereon, at the rate of six per cent per annum, from the 25th day of June, 1914, until paid, and her costs herein duly expended.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 26th day of June, 1914, the following order was made:

SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., Defendant.

The defendant this day produced its motion and Grounds for a new trial herein, which are filed and thereupon moved the Court

for a new trial of this cause, and this cause is submitted on said motion.

35 Said motions & Grounds for a new trial herein are as follows:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Comes the defendant, Chesapeake & Ohio Railway Company and moves the Court to set aside the verdict of the jury, in this case and the judgment of the Court entered therein and to grant it a new trial thereof, and assigns these its grounds in support of said motion:

First. Because the verdict is contrary to law.

Second. Because the verdict is opposed to the overwhelming weight of evidence.

Third. Because the amount of the verdict is excessive and so excessive that same appears to have been given under the influence of passion and prejudice.

Fourth. Because of error of the Court in excluding certain competent, relevant and material testimony offered by defendant, to which action of the Court the defendant at the time and in each instance objected and excepted.

Fifth. Because of error of the Court in admitting certain incompetent and irrelevant testimony offered by plaintiff, to which action of the Court defendant at the time and in each instance objected and excepted.

Sixth. Because of error of the Court in giving to the jury instructions numbers 1, 2, 3, 4, 5, and 6, and each of them,

36 and to the giving of each of said instructions the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendant.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 3rd day of July, 1914, the following order was made:

SARAH DWYER, Adm'r'x, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY Co., Defendant.

The defendant this day called up their motion for a new trial herein and the Court having considered of same and being sufficiently advised adjudges that said motion be overruled to which the defendants excepted and prayed an appeal to the Court of Appeals which is granted.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 3rd day of July 1914, the following order was made:

37 SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RY. Co., Defendant.

Upon motion of the defendants time is given it to and including the 6th day of the next September term of this Court to tender and file its bill of exceptions herein.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky on the 11th day of September, 1914, the following order was made:

SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., Defendant.

On motion of defendant it is ordered that time be extended and that defendant be and is given until and including the 11th day of the present term of this Court to file its bill of exceptions herein.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 17th day of September, 1914, the following order was made:

38 SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RY. Co., Defendant.

The Defendant this day produced and tendered its bill of exceptions herein, duly signed, sealed, and approved by the court, which is filed, and same is ordered to be and is hereby made a part of the record of this cause without being spread at length upon the order book.

Boyd Circuit Court.

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Be it remembered that on the 24th day of June, 1914, upon the calling of this cause for trial the same was submitted and trial thereof had and upon the trial the following evidence, steps and proceedings and objections thereto were taken and had as follows:

First the plaintiff, SARAH DWYER—introduced as a witness in her behalf, herself, who being first duly sworn, testified as follows, to-wit:

Direct examination:

39 Q. 1. Your name is Sarah Dwyer?
A. Yes, sir.
Q. 2. Where do you live?
A. I live on Greenup, between 20th and 21st.
Q. 3. In Ashland, Kentucky?
A. Yes, sir.
Q. 4. How long have you lived there?
A. About seven or eight years.
Q. 5. Are you the Widow of Richard Dwyer?
A. Yes, sir.
Q. 6. When did he die?
A. Died May, 10th, 1912.
27. 1912, was it?
A. Well, it has been four years——
Q. 8. 1910?
A. Yes, sir.
Q. 9. May 10th, 1910, is that the correct date?
A. Yes, sir.
Q. 10. Where was he killed?
A. At the place called England Hill.
Q. 11. Was his body brought to Ashland?
A. Yes, sir.
Q. 12. At what time of the day or night?
A. It was brought about 4 o'clock in the morning, the next morning.
Q. 13. Was he dead at the time he was brought to Ashland?
A. Yes, sir.
Q. 14. At the time of his death, what was his occupation?
A. He was an engineer.
Q. 15. For what company?
A. Chesapeake & Ohio Railway Company.
40 Q. 16. And where was his run-
A. Well, it was up Big Sandy, but I don't know, from Russell, I don't think he had a steady run——
Q. 17. His run was from Russell up the Big Sandy Division of the Chesapeake & Ohio Railway?
A. Yes, sir.
Q. 18. How long had he been running an engine at the time he was killed?
A. Two years, about.
Q. 19. Prior to that what was his occupation?
A. He was a fireman.
Q. 20. In whose employment?
A. The same road.
Q. 21. At the time of his death what was he earning as an engineer?

A. He made from $150.00 to $160.00 and $165.00 when he got in extra time.

Q. 22. You mean he was earning that running as an engineer, $150.00 for how much time? He made that much or more, how about that?

A. He made $160.00 and $165.00 and he had made $170.00-

Q. 23. As much as $170.00 per month?

A. Yes, sir.

Q. 24. At the time of his death did he own any property?

A. Yes, sir, we was paying for a home.

Q. 25. Where?

A. Where I am living now, between 20th and 21st. on
41 Greenup.

Q. 26. How much had you paid on it?

A. About six or seven hundred dollars, between six and seven hundred dollars.

Q. 27. Did he own any other real estate at the time of his death?

A. No, sir.

Q. 28. Have any personal property other than his personal effects?

A. No, sir.

Q. 29. Wearing apparel, and so forth?

A. No, sir.

Q. 30. Did you at the time of his death have any property in your own right?

A. No, sir.

Q. 31. To what extent, if any, were you dependent upon him and his earnings for your livelihood at the time he was killed?

A. Well, I depended on him all together. I didn't have any thing except what he made by his work, his wages.

Q. 32. What did he do with his wages?

A. He brought them to me.

Q. 33. Who kept up the expenses of the house-hold?

A. He always brought his money to me and I paid my bills.

Q. 34. Did he have any personal habits, by which he used any part of his earnings other than ordinary expenses?

A. No, sir.

Q. 35. What was his habits as to sobriety?

A. It was all right, he was a sober, good worker, and always provided well for me.

42 Q. 36. How many children did you have?

A. Two.

Q. 37. Had they been raised by Mr. Dwyer up to manhood and womanhood?

A. Yes, sir.

Q. 38. Were they schooled by Mr. Dwyer?

A. Yes, sir.

Q. 39. Were they married at the time of his death?

A. My daughter was.

Q. 40. Where was your son at the time of his death?

A. He was at home at the time his father was killed.

Q. 41. Was he able to take care of himself?
A. Yes, sir.
Q. 42. He was not dependent upon your husband for his living?
A. No, sir.
Q. 43. How old was Mr. Dwyer at the time of his death?
A. 45.
Q. 44. What was the condition of his health?
A. Good.
Q. 45. Was he able to work regularly and steady?
A. Yes, sir.
Q. 46. About what was his weight?
A. About 148.
Q. 47. And what was your age at the time of his death?
A. I was 43.
Q. 48. Had you any means, or source of income or revenue, from any source at the time of his death, other than his earnings?
43 A. No, sir.
Q. 49. Any one contribute to your support in any way except your husband?
A. No, sir.

Cross-examination:

Q. 1. You mean that your husband would turn all his wages over to you?
A. Yes, sir, he generally had board to pay up Big Sandy and he paid that and brought the rest to me.
Q. 2. Paid his board up — Big Sandy?
A. Yes, sir, he had to get meals when he was out.
Q. 3. He paid those expenses out of his salary?
A. Yes, sir.
Q. 4. And he turned all the money he received over to you except what he paid for board up — Big Sandy?
A. Yes, sir.
Q. 5. Who constituted your family—how many in your family?
A. Three of us.
Q. 6. He turned over to you sufficient money to take care of the expenses of the household?
A. Yes, sir.
Q. 7. He did that up until the time of his death?
A. Yes, sir.
Q. 8. Had he ever been sick?
A. No, sir, he never was sick that I can remember of. He was hurt once in a wreck, never was sick.
Q. 9. When was that?
A. I don't know how long ago it was.
Q. 10. Tell the circumstances?
A. I don't know, the engine turned over and he was hurt.
Q. 11. That — after you were married?
A. Yes, sir.
44 Q. 12. Can you tell just what injuries he received?
A. Well, he was scalded—he was burned about as bad as he could be.

Q. 13. Was he laid up for any considerable period of time?
A. Yes, sir.
Q. 14. How long?
A. Seven or eight months, maybe a little longer.
Q. 15. Do you remember—give us as near as you can when that was?
A. No, sir, I don't.
Q. 16. How long was he with the road?
A. I guess about seven years.
Q. 17. These injuries were received during that time while he was on the road?
A. Yes, sir.
Q. 18. How long was he fireman?
A. He was fireman for about four years.
Q. 19. And he was engineer for about three years.
A. Yes, sir.

Redirect examination:

Q. 1. Had he recovered entirely from these injuries?
A. Yes, sir. Yes, he had been working a long time.
Q. 2. Any effect from these injuries after he went back to work?
A. No, sir.

The witness, EMMA COMPTON, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. What is your name?
A. Emma Compton.
Q. 2. Where do you live?
A. Live at England Hill.
Q. 3. How long have you lived at England Hill?
A. About 11 years.
Q. 4. About how near to what is known as the England Hill cut?
A. I live right there in the cut, 30 or 40 feet out from the cut from the track.
Q. 5. Which side of the track do you live on?
A. Left hand side, going up.
Q. 6. Between the railroad track and the river?
A. Yes, sir.
Q. 7. At the time of the derailment of the train there, did you see it?
A No, sir, we was all in bed when it happened.
Q. 8. About what time was it?
A. It was about half past one by our time.
Q. 9. What did they do with the man that was hurt there, Mr. Dwyer?
A. They brought him in our house.
Q. 10. Did you go over and see where the train was derailed?

A. Never until the next morning, could see the fire, but I never went out on the track.

Q. 11. Did you see Mr. Dwyer that night?

A. Yes, sir.

Q. 12. Where was he?

A. He was at my house.

Q. 13. How did he come?

A. They carried him.

Q. 14. You know who picked him up and carried him over there?

A. Mr. Schump and Mr. Diamond and some railroad men, I don't know just who they were.

Q. 15. And he stayed there until he was taken away on
46 the train?

A. Yes, sir.

Q. 16. Did you see the rock and dirt on the track?

A. Yes.

Q. 17. You were not out there at the wreck that night?

A. Yes, sir.

Q. 18. What was the matter with him as he appeared, when brought to your home?

A. Well, I don't know exactly, how he was injured, had a skinned place on his head and he had *hemmorrphages* from his lungs, they laid him on the floor on a quilt and he just laid there——

Q. 19. Did you pass up and down the railroad track through that cut before this derailment occurred?

A. Yes, sir.

Q. 20. Did the derailment occur above or below your house?

A. It was just a little above.

Q. 21. A little above?

A. Yes, sir.

Q. 22. Did you notice the nature of the material in that cut?

A. Yes, sir.

Q. 23. What kind of a cut was it, a slippery cut or not?

A. A slippery cut, I always call them.

Q. 24. What did it have in it?

A. Small rocks and dirt, and it would be slipping in——

Q. 25. Every know of the track along there being cleaned up——

A. Yes, sir, often—the work hands would come along and dig it out of the ditch——

Q. 26. You had seen them dig out the ditch there?

A. Yes, sir.

Q. 17. Who was it did that?

A. The section foreman and his hands.

Q. 18. Did you see that big rock before it fell?

A. All along, I can't say just now when I saw these rocks in the ditch, there was a few small ones——

47 Q. 19. And the section men would remove it, the dirt and rocks that fell?

A. Yes, sir.

Q. 20. Do you remember any thing about a rock and some dirt slipping in there and on the track? Some time before this derailment?

A. Not to amount to any thing, only on Mr. George Arthur's Section when he was section foreman, a rock fell on the railroad track then.

Q. 21. Who removed that rock?

A. Mr. Blankenship and my husband.

Q. 22. Who was Mr. Arthur working for at that time?

A. He was the section foreman.

Q. 23. Where was it?

A. It was just below where this big one came in.

Q. 24. Where was it, on the railroad track?

A. Yes.

Q. 25. What did they do with it? How did they remove it?

A. They broke it with a pick and took it off.

Q. 26. About how long before this derailment did that happen Mrs. Compton?

A. Yes, this was in August, some time before this, about a year and six months before this.

Q. 27. Now what was it that caused that derailment there?

A. Why, there was a big rock sticking out that come down and dirt and other rocks, they came out and that caused it.

Q. 28. Did you see the big rock on the track?

A. No, sir, I didn't. Saw the man there next morning working. I didn't see it until after they had rolled it out on the bank.

Q. 29. Where did they leave it?

A. Left it right opposite to our house.

48 Q. 30. Between the river and the railroad track?

A. Yes, sir.

Q. 31. On the left hand side going up?

A. Yes, sir.

Q. 32. And who was it that did that?

A. It was the wreck train of the railroad Company.

Q. 33. Now before you saw the rock and material being removed that morning had you ever seen the track itself being cleaned of dirt and rocks off of it, before this?

A. A good deal, yes.

Q. 34. Now you had seen where this rock hung in the cut before this, hadn't you?

A. Of course—I didn't examine that rock—I could see it in among the dirt and other stuff there——

Q. 35. After the derailment did you notice the side of the cut where the rock had been?

A. Yes, sir.

Q. 36. How long had it been there—is the rock in the cut there, that you noticed that fell?

A. Yes, sir.

Q. 37. How much had it changed, or moved since you had been there?

A. Of course,—I didn't inspect that rock. I could see it there in the cut as I would pass by.

Q. 38. How did it look, was it solid all through?

A. Why on the upper side of the rock there was a place broke and open and dirt behind the rock——

Q. 39. On which side?

A. On the upper side.

Q. 40. About what size was the rock?

A. About ten feet long and six feet wide.

Q. 41. What position was it laying in the cut?

A. It was laying so that it partly showed, say here was the rock and part of it showed, I can't tell exactly, it was laying in the
49 slope of the cut——

Q. 42. Could you tell that the rock was changing its position any?

A. Yes, these rocks and dirt kept coming down.

Q. 43. *Saw* whether or not this rock looked like it was changing its position, was moving—or sliding away from the cut?

A. It looked like it was gradually coming down, giving away—could see it and it looked like it was.

Q. 44. How much of the length of the rock could you see before it fell?

A. About five feet.

Q. 45. Then you saw about half way of the rock?

A. Yes, sir.

Cross-examination:

Q. 1. As I understand it you live between the track of the Chesapeake & Ohio Railway Company, and the Big Sandy River?

A. Yes, sir.

Q. 2. How far from the track?

A. About 30 feet.

Q. 3. Just across the England Cut?

A. Yes, sir.

Q. 4. That is where the wreck occurred, wasn't it, in that England Hill cut?

A. Yes, sir.

Q. 5. That is a rocky hill side?

A. Yes, sir.

Q. 6. Rocky bluff?

A. Yes, sir.

Q. 7. These rocks that are in that bluff, do they extend back into the side of the hill—back into the hill?

50 A. Well, you can see them, you can't tell just how far they extend back into the hill——

Q. 8. How long do you think this rock was?

A. 10 feet, that you could see.

Q. 9. Where did you see the rock?

A. I seen it right there by our house.

Q. 10. What size in your judgment was it?

A. Ten feet.

Q. 11. Ten feet long?
A. Yes, sir.
Q. 12. How wide?
A. About six feet.
Q. 13. How thick?
A. About two feet.
Q. 14. About two feet thick?
A. Yes, sir.
Q. 15. Now how much of that rock did you see, that was on the side next to the rail?
A. You could only see about that much of it,—(indicating)
Q. 16. Could you see the thickness of it?
A. Yes, sir.
Q. 17. Thickness on the side of the bluff?
A. Yes, sir.
Q. 18. Did you see the thickness of the rock, length wise 10 feet, or the short wise, 6 feet?
A. Why, you could only see a little bit of it until it came down.
Q. 19. How much could you see?
A. I could see the depth of it, couldn't see it in length——
Q. 20. As I understand it you saw the thickness of the rock where it projected out of the side of the bluff and you say that rock was two feet thick?
51 A. Of course I didn't measure it then, I don't know how much it was.
Q. 21. Whether you measured it or not it was the face of the thickness that you saw?
A. Yes, sir.
Q. 22. And it extended back into the bluff how far?
A. I don't know how far it extended—how far it went.
Q. 23. Did it go back into the bluff any?
A. Yes, sir.
Q. 24. You could see the face of that rock—two feet of it, thick, but you don't know how far it extended back into the bluff?
A. I don't know how thick it was before——
Q. 25. Underneath that rock was ledges of slate rock?
A. Yes, sir.
Q. 26. Solid almost from the ground?
A. They worked out gradually——
Q. 27. Solid slate foundation from the bottom of the cut up to where this rock laid?
A. I don't know slate or not. Small rocks in the side of the hill and they kept falling down in the ditch——
Q. 28. And when they would fall down in the ditch the section men would come along and clean the rocks and dirt out of the ditch?
A. Yes, sir.
Q. 29. You have seen them working there?
A. Sure, when I passed them.

Q. 30. It is frequently the case in a cut of the character that you speak of this one being that rocks are known to fall?

A. Yes, sir.

Q. 31. You say that some time before this rock fell another rock had fallen there in that cut, when was that?

52 A. Yes, sir, it was in—I judge—It was when Mr. George Arthur had charge of the section.

Q. 32. What time was that?

A. I don't know only it was during the time when George Arthur had charge of the section there.

Q. 33. George Arthur preceded Barney Wells as section foreman there?

A. Yes, sir.

Q. 34. Did you know that the rock extended back into the *bluff* except that you know that it extended back to the bluff?

A. No, sir, I can't say that it extended back into the cliff, it was covered.

Q. 35. It was covered with dirt, and didn't you notice it to be that way?

A. I guess it was.

Q. 36. It looked like it was—back in the rocks—in the bluff, like any other rock there?

A. Yes, sir.

Q. 37. Did you see the entire length of that large rock, or just the width of it?

A. Yes, sir, saw the width of it, and of course you could see a small portion of it.

Q. 38. Didn't you *saw* this rock was 10 feet long and six feet wide, didn't the rock extend this way (indicating) ten feet?

A. I don't know.

Q. 39. Which way was it turned?

A. I don't know, looked like it was kinda out at the other corner, of course I couldn't tell how far it went back into the hill.

Q. 40. You never noticed the crack that you have mentioned until after the rock had fallen out?

A. Yes, sir. Why, yes, sir. The crack was there some time

53 before the rock fell, on the upper side.

Q. 41. You testified in this case before, didn't you?

A. Yes.

Q. 42. At that time wasn't you asked on cross-examination about that crack in the hill, this question: "55. Now that crack was in bluff, the side of the bluff there?" and did you not make this answer: "A. Yes, sir." "Q. 56. And up at the place where this big rock and dirt fell? A. Yes, sir."

A. You mean after the rock fell?

Q. 43. Yes.

A. Well, there was a crack there, of course. Take a rock that big out of there——

Q. 44. A crack where?

A. Where the rock fell.

Q. 45. Is that the crack you testified about on the other trial?

A. No, sir. The other crack——

Q. 46. And was not these questions asked you and did you not make these answers on the other trial? "Q. 56. And you noticed this crack after this happened? A. Yes, sir. Q. 58. Was that the first time you had noticed that crack there—— A. Yes, sir." Didn't you testify that way on the other trial?

A. That is all you asked me about——

Q. 47. Do you now recall of having testified that way before and is it correct?

A. No, sir. You asked me to described about how the rock laid and of course I described it as best I could——

Q. 48. I am not asking you about your direct-examination—I asked you if you didn't mention before that the crack was in the side of the bluff? Did the crack extend into the side of it or not?

54 A. I seen the rock there after the regular force and the extra force had took it out of the way——

Q. 49. You recollect now of seeing two cracks, one before and one after?

A. Well, I don't suppose he was asking about the other.

Q. 50. *You* crack that you could see before the rock fell, was up and down?

A. Yes, sir.

Q. 51. And parallel between this large rock and other rocks?

A. Well, I don't know about the other rocks.

Q. 52. And one that was back in the side of the hill?

A. Yes, sir.

Redirect examination:

Q. 1. About what was the character of that crack, four or five or six inches long?

A. No, sir.

Q. 2. Could you see it from the railroad track?

A. No, sir, you can't see it all coming down, can't see all of it.

Recross-examination:

Q. 1. Now to stand and look at the hill side these rocks and the general appearance of the cliff is all about the same, the rocks just extend back horizontally into the hill?

A. I can't tell you just how it was, I know the general appearance of the side of the hill all about the same—there was a large rock and it came out of there——

Q. 2. You don't know what proportion of the rock you saw, either of its width or length?

55 A. Of course, I saw the width, but I wouldn't say that I saw it all, it was covered with dirt on one side of the cut——

Q. 3. How far did that rock project—out from the hill side?

A. Came out that way, kinda out in a point, where the big rock was——

Q. 4. You know how many feet or inches of it, you could see?

A. The place, where the end part of it was, could see about two feet.

The witness, JOE COMPTON, being first duly sworn, testified as follows, to-wit:

Redirect examination:

Q. 1. Where do you live.
A. I live up Sandy here, at England Hill.
Q. 2. England Hill cut?
A. Yes, sir.
Q. 3. And you are the husband of Mrs. Emma Compton, who just testified?
A. Yes, sir.
Q. 4. And you have lived at the place she spoke of, how long?
A. Well, I don't remember just how long.
Q. 5. You remember the occasion when a freight train of the Chesapeake & Ohio Railway Company was derailed up there?
A. Well, I wasn't at home at night, just that night.
Q. 6. You remember the fact that it occurred?
A. Yes, sir.
Q. 7. Up to that time how long had you been living there?
A. Well, I can't say just how long.
56 Q. 8. About, your best judgment?
A. I had lived there, I *except* ten or twelve years, some where like that.
Q. 9. You say you wasn't at home the night the derailment occurred?
A. No, sir, I wasn't there.
Q. 10. How long after the accident before you got up there?
A. Well, it was a week or so, I guess.
Q. 11. A week or more?
A. Yes, sir.
Q. 12. Were you familiar with the place where the derailment happened?
A. Yes, sir.
Q. 13. What kind of material was in that cut?
A. Well, sir, it looks like a slaty kind of rock, loose layers and some hard rock mixed, through—some of the rocks stick out of the hill, and are liable to fall——
Q. 14. Before this had any rocks fallen down out of the cut there?
A. Yes, sir.
Q. 15. How long before?
A. Something like a month before.
Q. 16. What became of the rocks on the track at that time?
A. I went out myself and rolled them off of the track.
Q. 17. Where did you roll them to?
A. Rolled them off to the side of the track.
Q. 18. You removed several of them?

A. Yes, sir.

Q. 19. Any body ever help you move any rocks off of the track there in the cut?

A. They did, once.

57 Q. 20. Who helped you?

A. Pete Blankenship. I went and told George Arthur about it and he sent one of his men with me to help get it off.

Q. 21. Blankenship assisted you to remove the rock?

A. Yes, sir.

Q. 22. The other you got off by yourself?

A. Yes, sir.

Q. 23. Why did you do that?

A. I just didn't want to see a train wrecked or some thing like that, so I rolled the rock off of the track——

Q. 24. Did the section foreman and the section men know of the falling of the dirt and rocks in there in that cut, from that slope?

A. Indeed, I don't know if he did or not.

Q. 25. Ever say anything to the section foreman at that time about it?

A. No, sir, only George Arthur, he was section foreman, when I rolled the stone off and the one I told about it.

Q. 26. George Arthur was the section foreman at that time?

A. Yes, sir.

Q. 27. Did the railroad Company ever pay you for removing rocks and dirt from the cut?

A. One time, when Mr. Blankenship helped me, broke the rock up and rolled it off, they paid me for that.

Q. 28. How high is the cut?

A. 15 or 20 feet in the highest places.

Q. 29. Had your attention ever been drawn before this derailment to that cut and the rocks that were in that cut?

A. Yes, sir.

Q. 30. What drew your attention—You saw the rock that fell before it fell?

A. Yes, sir, the rock came loose from the rock bank, the dirt and stuff kept pushing behind it and it gradually washed down behind it and kept pushing it down all the time.

58 Q. 31. Any thing indicate to you that it was loose?

A. Yes, sir.

Q. 32. What indicated to you it was loose?

By the Court: Just describe it. The Condition there.

A. It was a hard flat rock, two feet thick, and about four or five feet wide and about ten feet long, wider on the bottom, and every time there was a bad wash it would wash stuff down in behind there and keep it pushed out——

Q. 33. Did it slip *on more* any from the time you first noticed it until the derailment?

A. Yes, sir.

Q. 34. About how much had it moved during the time you had lived there and had observed it?

A. I don't know how much it did move——

Q. 35. For how long had you noticed, if you had of the rock not being in the hill?

A. Some three or four weeks.

Q. 36. And may be longer?

A. Yes, sir, I couldn't tell you exactly what time.

Q. 37. That one of a chain of rocks, *on* still above the railroad track?

A. I don't know, there was some three or four slabs left—didn't clear the track, from which it could have split——

Q. 38. When you first noticed it after it fell it was moved, I suppose?

A. Yes, sir.

Q. 39. How far from the railroad ties, did they have this slope?

A. Well, there was four or five feet may be. Just giving it as a guess, never measured it.

59 Cross-examination:

Q. 1. When was it that you first noticed the rock was loose or insecure?

A. Some three or four weeks before the accident

Q. 2. It had been that long a time before the accident that you first noticed the rock was loose?

A. Yes, sir.

Q. 3. Had you ever noticed the rock before that, and if so for how long?

A. Noticed it, prior to that time. Yes, for six months or a right smart while.

Q. 4. How much do you think it had come down, moved, during that time.

A. Well, I don't know exactly how far. Just the wash, coming in behind it.

Q. 5. How much did you notice it slipping?

A. I expect 2 or 3 feet.

Q. 6. You noticed it moving that far?

A. Yes, sir.

Q. 7. You testified before in this case?

A. Yes, sir.

Q. 8. Didn't you testify before as follows: "Q. 34. How was it down next to the bottom, solid, wasn't it? A. When it would be wet, it would be slipping, you could tell *you* that?" Was that question asked you and did you make that answer?

A. I suppose it was.

Q. 9. And was this question asked you, "Q. 35. You think this rock had come out four or five inches? A. Yes, sir." And this question, "Q. 38. This rock had slipped out toward the track, four or five inches, that it? A. Yes, sir." Did you say

60 that?

A. I suppose so.

Q. 10. Why do you say now that it moved two or three feet?

A. I guess, I said after it come out of the hill.

Q. 11. What did you mean by saying before that it had moved four or five inches?

A. Four or five inches down the slope—four or five inches down the rocky hillside——

Q. 12. And rolled down the slope, two or three feet from where it came out of the main bank?—did it roll out of the track three or four feet?

A. Didn't get quite to the track at that time.

Q. 13. Will you explain why you said before that the rock slipped four or five inches from the time you first noticed it, and now you say it slipped two or three feet?

A. Where it came out at the main bank—I had noticed it, five or six feet pushed out——

Q. 14. What did you mean on the last trial when you said four or five inches?

A. I meant to say where it fell out of the bank, where it became loose and fell out, I noticed where it had moved out four or five inches.

Q. 15. How long before this train was derailed had you noticed that?

A. A great while.

Q. 16. Just give us your best independent recollection?

A A month or two.

Q. 17. A month or two?

A. Yes, four or five inches, it was about a month.

Q. 18. And later on you say it was two feet?

A. Yes, at the time the rock fell out of the bank, it was.

Q. 19. These rocks all extended horizontally back into that bluff, didn't they?

61 A. No sir, the- laid flatways in the side of the hill.

Q. 20. Did this one that fell lay and extend clear back into the hill?

A. No, this one didn't.

Q. 21. This was laid out?

A. Yes, sir.

Q. 22. Wasn't the whole rock exposed?

A. No, not all.

Q. 23. How much of it was exposed?

A. Five or six feet.

Q. 24. Five or six feet of it exposed?

A. Yes, sir.

Q. 25. That is a pretty steep bluff, ain't it?

A. Yes, sir.

Q. 26. It is almost perpendicular, straight up and down?

A. No, not perpendicular.

By the Court: What first attracted your attention to this rock?

A. Well, I saw it was coming out, sliding down from the side of the hill, and I just kept noticing it then to see how much it had slipped down.

Q. 27. That is what first attracted your attention?

A. Yes, sir.

Q. 28. How long was that before it fell?
A. Two or three months or maybe longer.
Q. 29. Two or three months?
A. Yes, sir.

Redirect examination:

Q. 1. This rock was loose from the rest of the bank?
A. Yes, sir.

Recross-examination:

62 Q. 1. Did you ever testify before that you saw that that rock had slipped two or three feet at any time? I will ask you if on the first trial of this case, you did not testify, about that rock slipping two or three feet?
A. Not that I recollect of.

Re-redirect examination:

Q. 1. Were you not also asked on the other trial as to how far the rock stood out from the rest of the bank there and you said five or six inches?
A. Yes, sir.
Q. 2. And was that true?
A. Yes, sir.
Q. 3. And you answered all that you were asked about?
A. Yes, sir.

Re-recross-examination:

Q. 1. You said it had slipped four or five inches, on one side?
A. I said it had slipped out some four or five inches, giving down then.
Q. 2. You never have testified about it giving down or slipping to the extent of two or three feet, this is the first time you have ever testified to that?
A. I don't recollect.
Q. 3. You don't recollect of ever having testified to anything of that kind before?
A. No, sir.

63 The witness, GEORGE STANLEY, being first duly sworn testified as follows, to-wit:

Direct examination:

Q. 1. How old are you?
A. I am about 60, I guess, 60 or 65, I don't know hardly which.
Q. 2. Where do you live?
A. Live on Chadwicks Creek.
Q. 3. How long have you lived on Chadwicks Creek?
A. Near about three years.

Q. 4. At the time the train was wrecked up here on the Big Sandy Division at the England Hill cut, where did you live?

A. Well, just about that time I lived about two or three hundred yards down below where the wreck was, but I didn't never measure it.

Q. 5. Two or three hundred yards below where the wreck was?

A. Yes, sir.

Q. 6. Did you live along the railroad track?

A. I lived on the left hand side as you go up.

Q. 7. Left hand side going up?

A. Yes.

Q. 8. Did you have any occasion to pass through that cut before that wreck?

A. Well, I kept my cow in Shock Richardson's pasture and me and my wife would go backwards and forwards to milk and we would kinda notice that rock.

Q. 9. How often would you go through there?

A. Yes, sir, twice a day——

Q. 10. To milk?

64 A. Yes, sir, go to milk the cow and come back——

Q. 11. You kept the cow in Shock Richardson's pasture?

A. Kept her in Shock's pasture.

Q. 12. And you all would go up there to milk her?

A. Yes, sir.

Q. 13. And you would pass through there twice a day, every day?

A. Yes, sir.

Q. 14. How long had you been going through there when that accident happened?

A. Well, we had been going through there a couple of years, *two* pastures.

Q. 15. During that time and before this derailment did you notice any loose rock, that might fall out?

A. I would notice it every time I passed.

Q. 16. You noticed that every time you passed?

A. Yes, sir.

Q. 17. What did you notice about this rock that fell, if any thing?

A. It was dropping all the time, the dirt washed down and my wife would run a past that rock.

Q. 18. Why?

A. She was afraid of it.

Q. 19. What was there about it, if any thing that made it look dangerous?

A. Well, the rock sit up in that position and loose underneath, looked like you could take a hand spike and push it off.

Q. 20. Was it attached to, or loose from the rest of the hill there?

A. Well, it looked to me like it was pushed loose from the main cliff.

Q. 21. Pushed loose from the main cliff?

A. Yes, sir, kinda shrunk down from the main cliff.

65 Q. 22. What became of that rock?

A. I don't know, I never measured it, or nothing of the sort.

Q. 23. What became of it?
A. It is laying over on the left of the railroad.
Q. 24. As you go up?
A. Yes, sir.
Q. 25. Between the railroad and the river?
A. Yes, sir, right before Joe Compton's door.
Q. 26. Who put it there?
A. These here railroad men, I reckon—can't tell who put it there—they lifted it with the wrecker——
Q. 27. The wreck train lifted it off?
A. Yes, sir.
Q. 28. Where did they lift it from?
A. Lifted it off of the railroad.
Q. 29. When was it?
A. I couldn't tell you right exactly when it was.
Q. 30. How long after the accident was it that they lifted this rock off of the track?
A. Oh, they lifted it off, I think, that evening, I ain't right certain that they lifted it off that same evening, but I know it was right at once.
Q. 31. Do you know what time the train was wrecked?
A. No, I don't know exactly what time it wrecked, I went up there just a short while after it wrecked and they had taken the man over to Joe Compton's.
Q. 32. And that before the wreck train came?
A. I can't tell you exactly when the wreck train came, but it come.
Q. 33. Did you see the rock there
A. Yes, sir.
Q. 34. Where was it then?
A. Well, it had kinda slid over, up on the railroad.
66 Q. 35. On the track?
A. On the track.
Q. 36. And where did you next see it?
A. I stood right there, sir, until they lifted it off with the wrecker.
Q. 37. And they laid it on the left hand side?
A. Laid it on the left hand side as you come up.
Q. 38. Did you see the engine there that was wrecked?
A. Yes, sir.
Q. 39. What wrecked it?
A. Well, I couldn't tell you, if that rock didn't wreck it I couldn't tell you what wrecked it.
Q. 40. Had it hit the rock?
A. I suppose it had.
Q. 41. Knock the engine over against the rock, or on it?
A. No, it was kinda leant over.
Q. 42. Laid over against the rock?
A. Yes, I couldn't tell if the train was wrecked on the rock or not, I suppose it was through.
Q. 43. Was that the same rock that you had seen in the cut there, that you speak of?
A. Yes, sir, same rock.

Q. 44. How long did you n tice that rock there loose?
A. About a couple of years.
Q. 45. As much as two years
A. Yes, sir.
Q. 46. Had it changed any in position during that time?
A. Well, I don't know as it had, but it looked to me like a big crack all the time, the dirt had washed in and it was pressed out, and in a very wet time it would be filled with dirt there and stuff from the rock, and it looked dangerous.

67 Q. 47. Some times the dirt would wash over it and some times it would be washed off of it?

A. Yes, sir.
Q. 48. Was there space between it and the main body of the hill.
A. Well, if there was I couldn't see it.
Q. 49. You spoke about it being prized loose?
A. It was prized loose, I could get a hand spike behind it——
Q. 50. You mean a crack was in it?
A. Yes, sir, a crack.

Cross-examination:

Q. 1. You spoke about during wet spells dirt falling down, that was all along the side if the bluff, wasn't it?
A. Certainly, I have seen rocks slide off in the cut——
Q. 2. They would fall in the ditch there, and you have seen the ditch cleaned out?
A. Yes, sir.
Q. 3. That was an often occurrence all along the whole side of the bluff?
A. Yes, sir.
Q. 4. It will come in, in bunches?
A. Yes, sir, more so when you tend up above the cut, it will be washed more.
Q. 5. Now you say there was a place there that it looked like you could put a hand spike in?
A. Yes, sir.
Q. 6. That was in between this rock and another rock next to it?
A. Yes, sir.
Q. 7. A crack up and down on the side of the cliff?
A. It was up this way, here stood the main cliff and here stood a rock (Indicating) and it looked to me like you could put a hand spike in there and prize that rock off.

68 Q. 8. Take this side of the table as the side of the Cliff, the rock laid in this way? (Indicating.)

A. Yes, sir.
Q. 9. Crack between this rock and the one next to it?
A. No, sir, crack run lengthwise.
Q. 10. On top of the rock?
A. No, right in the middle of it, when that rock fell it left the face of the cliff here—another rock——

Q. 11. The crack that you are talking about was in the middle of the big rock—the crack?

A. This rock that fell off, connected by the crack—after it fell off——

Q. 12. The crack that you speak of, you told me extended up and down the side of the cliff, didn't you?

A. No, sir, I never did.

Q. 13. Which was did it extend?

A. Lengthwise, up and down this way (indicating) here is the cliff and here stands the rock, this end, the upper end was sprung out about far enough it looked like to me to get a hand spike in there.

Q. 14. The way you placed your hands, here was the side the crack was on and here was the rock here?

A. No, sir.

Q. 15. That is the way you have got your hands?

A. No, sir. My hands are correct—this hand is where the upper end of the rock, and it was about four or five inches, looked to me like far enough to get a hand spike in there and prize it down.

Q. 16. You remember about it being out four or five inches?

A. Yes, the part next to the railroad.

Q. 17. The whole rock was out that way?

A. The bottom of it was on slate, but I suppose it kept on
69 cutting, and the stuff coming down here, kept on pushing the rock out——

Q. 18. What kind of material did it rest on?

A. On slate, or some kind of a soap stone.

Q. 19. And extended back into the side of the cliff?

A. It run down, you couldn't see the end of it.

Q. 20. Where?

A. The lower end.

Q. 21. Where was it?

A. It was "agin" the hill.

Q. 22. If it was against the hill you could see it, couldn't you?

A. I don't suppose you could.

Q. 23. What do you know about it?

A. I suppose, there was a little dirt on the lower end of it.

Q. 24. Could you tell how large the rock was when it extended back into the hill?

A. Well, I know from what I could see of it, I could see it on the outside, up and down, I could see about five or six feet as near as I can get at it.

Q. 25. You could see five or six feet of that rock?

A. Yes, sir, but I couldn't see underneath, or I couldn't see through the crack.

Q. 26. How far did that rock project out from the side of the hill?

A. Well, it slanted out about three or four inches——

Q. 27. Three or four inches, out of the side of the hill.

A. One end of it——

Q. 28. One end was out three or four inches?

A. Yes, sir.

Q. 29. What about the balance of it?

A. The balance was sitting on soap stone and a little
70 dirt down at the lower end of it was exposed.

Q. 30. What was on top of the balance?

A. Dirt and stuff that had washed down.

Q. 31. How far up from the level of the track was that rock in the hill?

A. It was five or six feet, I reckon, I never measured it.

Q. 32. Four or five feet?

A. Five or six feet, I never measured it, only just guessing.

Q. 33. How long was that rock?

A. Well, sir, I never measured it, never went around it.

Q. 34. You saw it?

A. I never measured it, I seen it.

Q. 35. What is your judgment about it?

A. I suppose the rock was close to ten feet long.

Q. 36. How wide was it?

A. About five or six feet wide, or seven.

Q. 37. How thick?

A. Well, I don't know really, I never measured the rock.

Q. 38. Give me your judgment about the thickness of the rock?

A. I guess about two feet thick, or a little over.

Q. 39. Now that was the thickness of the rock that projected out, wasn't it?

A. Yes, sir.

Q. 40. The thick part of it?

A. Yes, sir, it stood upon its edge.

Q. 41. What do you mean by sitting up on its edge?

A. Well, you have seen a sliver of rock, split off of a rock, and the jury can get an idea how that is.

Q. 42. I want you to give us an idea how that is——

A. I don't know, there was some there that didn't fall.

Q. 43. What kept them from falling?

A. I couldn't tell you, only it was a soap stone cut—it kept it from falling——

71 Q. 44. How far from the outside edge of the soap stone out to the projection of the rock?

A. I never paid enough attention to that.

Q. 45. Four or five inches?

A. I told the old woman if I had a hand spike I could stick in there and prize it out, and prize it down—If I had one, I would prize it down, and she says if you do some one will get killed——

Q. 46. You and your wife walked by it all the time?

A. No, sir, she run by it.

Q. 47. How would she go?

A. She would get on the far side of the track and would run by it.

Q. 48. Now in order to get the thing in my mind, get your testimony correct about it,—I just want to repeat the question again—I want to know just as near as you can give it, how much of the rock—the actual rock you could see?

A. Underneath?

Q. 49. The whole rock? How much of the whole rock?

A. Well, sir, I don't know exactly,—if I should die, I couldn't tell you.

Q. 50. In other words, you wouldn't say how much you could see?

A. I don't know as I could. I could make a blunder at it, it is not my desire to tell a lie, I want to tell the truth.

Q. 51. You had noticed the rock for some time prior to the night the train was derailed?

A. Yes, sir.

Q. 52. Ever notice any change in the position of the rock during that time?

A. Never paid much attention only as we would pass there and me and my wife would notice the rock of course, If I had known I would have been on the witness stand I would have paid a
72 little better attention to it.

Q. 53. As a matter of fact you didn't pay much attention to it?

A. Of course, I was watching "atter" my own family.

Q. 54. You testified before in this case didn't you?

A. Yes, sir.

Q. 55. Didn't you testify then that the crack extended up and down the hill?

A. Up and down, lengthwise, up and down.

Q. 56. Up and down and lengthwise are entirely different?

A. I didn't state the crack was up at the top, I said the crack was up here and the rock was "kind a swagged out.

Q. 57. I will ask you if this question wasn't asked you on your Cross Examination: "Q. 18. Where was that crack did it extend up and down in the cliff" or lengthwise in the cliff and did you not answer: "A. Up and down?"

A. I might have done it, but I have showed the jury and you to-, like this is the cliff and it was up and down here (indicating) at the end, the rock had come out and I could have taken a hand spike and prized it out——

Q. 58. This crack was just an ordinary crack like you see in rocks on the side of the hill, wasn't it?

A. Certainly.

Q. 58. Run up and down?

A. No, sir, it run lengthwise.

Q. 59. Why did you tell me that then?

A. You folks just misunderstood me.

Q. 60. I didn't——

A. Of course they may have misunderstood the way I have given it, but it was lengthwise.

73 Redirect examination:

Q. 1. Lengthwise, you mean up and down the river?

A. Yes, sir.

Q. 2. And the space between the rock and the slope was at the upper end of the rock?

A. At the upper end, yes, sir.
By the Court: Going up the river?
A. Yes, sir.

The witness, JOHN BOYD, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where do you live?
A. Live in the 4th. ward now.
Q. 2. Catlettsburg?
A. Yes, sir.
Q. 3. In May, 1910, where did you live?
A. I lived in Ewing District—England Hill District, you might say.
Q. 4. England Hill District?
A. Yes, sir.
Q. 5. Were you farming then?
A. Yes, sir.
Q. 6. Where it that with reference to the England Hill cut, on the C. & O.? Did you live above that cut?
A. I lived above it, yes, sir.
Q. 7. How far?
A. About a mile.
74 Q. 8. In going to and from Catlettsburg to your farm up there, did you pass through this cut up there—the England Hill cut?
A. In coming to town, I passed it, of course.
Q. 9. Walking the railroad. Would you walk the railroad, or how?
A. Walked the railroad.
Q. 10. When you would not be hauling some thing?
A. Yes, sir.
Q. 11. You remember the time the train was wrecked up there?
A. Yes, sir.
Q. 12. You remember when that was?
A. In May, I think.
Q. 13. How long ago?
A. 1910, I think it was.
Q. 14. 1910?
A. Yes sir.
Q. 15. How long before that had you been in the habit of going up and down through that cut?
A. I don't know how long I had been in the habit of walking there, up and down the railroad, been traveling it ever since the railroad had been built, been a good while since I first traveled it.
Q. 16. Did you ever notice the nature of the material in that cut?
A. Kind of a loose crumbly rock, looked like.
Q. 17. During that time had you noticed any rock in that cliff that looked different from the others in any way?
A. I noticed a rock in the cliff that looked like it was going to

come down, that was extending out—looked like it had slipped loose from the original rock, some distance, I can't say just how far it had slipped, slipped five or six inches, made a crack there.

Q. 18. Five or six inches from what?

A. That far from the other rocks.

75 Q. 19. It separated and was loose from the other rocks?

A. Yes, sir.

Q. 20. How long had you noticed that rock being there that way before the wreck?

A. I had noticed it several times in passing.

Q. 21. How long had it been since you first noticed it?

A. It wasn't very long before the wreck.

By the Court: About how long?

A. It might have been a week, or more than a week, I can't say for sure, I know I passed the rock all the time.

Q. 22. How did it compare in size with the other rocks in the slope there?

A. Well, I don't know, some rocks smaller—of course some larger than it was.

Q. 23. About what size rock was this that you noticed had become loose and separated from the rest of the slope?

A. Well, the rock that extended out was four or five feet—the side of it that was naked and the end of it stood out from the cut, the nearest end towards town.

Q. 24. There was four or five feet of it exposed?

A. Yes, sir.

Q. 25. And one part of it stood out four or five inches, that right?

A. Yes, sir.

Q. 26. What about the other part of it?

A. The other part was covered up with dirt.

Q. 27. Covered with dirt?

A. Yes, sir.

Q. 28. Which end was covered by dirt?

A. The lower end of it.

Q. 29. The lower end?

A. Yes, sir.

76 Q. 30. Was there any thing about the condition of the rock that indicated to you that it was dangerous, or might fall, other than the distance between it and the rest of the slope?

A. I spoke to some other people that was with me, I don't know just who it was——

By the Court: Don't tell what you told.

Q. 31. Just tell what there was that indicated to you that it was dangerous or liable to fall?

A. I thought the rock might fall is all.

Q. 32. Why did you think so?

A. Because it was loose and slippery, had a foundation of soap stone and stuff on there, several ingredients—and it was over the railroad track, away up there——

Q. 33. The material under it was a slippery sand stone material?
A. Yes, sir.
Q. 34. What became of the rock?
A. I saw that rock later on, on the left hand side of the railroad next to Mr. Compton's house.
Q. 35. Left hand side of the railroad?
A. Yes, sir.
Q. 36. When did you first see it there?
A. I saw it there just a day or so after the wreck.
Q. 37. And did you notice that it had disappeared from the hill top slope?
A. Yes, sir.
Q. 38. How high above the railroad track was this rock in the slope?
A. It might have been five or six feet.
Q. 39. About what size was the rock?
A. I never measured the rock—the rock looked like it might have been eight or ten feet long, and probably a couple of feet thick.
77 By the Court: And how wide?
A. Five or six feet wide.

Cross-examination:

Q. 1. The formation of the side of this cliff where the rock came from was a slatey formation, wasn't it?
A. Yes, sir.
Q. 2. This rock laid on the slate?
A. Yes, sir.
Q. 3. It projected right out from the side of the cliff?
A. Yes, sir.
Q. 4. Laid in the cliff flat ways?
A. Yes, sir.
Q. 5. Which edge of this projected out from the cliff and the other rocks?
A. The upper end of it going down towards Catlettsburg, stood out, the other end was back quartering in the hill.
Q. 6. That was all covered by the portion of the cliff that was on top?
A. Yes, sir.
Q. 7. How far did you say the rock projected out from the side of the cliff?
A. I said it wasn't—along the side of the track you could see four or five feet.
Q. 8. You mean you could see the width of the rock for four or five feet?
A. Yes, sir.
Q. 9. And that projected out from the side of the cliff for four or five inches?
A. I mean the length of it, was down that far—the width of it extended up like this, probably four or five feet——

78 Q. 10. Take the top of this box—this was the length of the rock and this part towards Mr. Malin to be the width and here is a flat surface, here is the cliff, and extending down that way was the slaty formation?

A. Yes, sir.

Q. 11. Above that was rocks and dirt and material of that character?

A. Yes, sir. It extended out four or five inches from the main rocks—the cliff—up and down the hill, another rock behind it, it had slipped away from another rock, and out from it——

Q. 12. And the hill was back of the rock?

A. Yes, sir.

Q. 13. You couldn't see it all?

A. Only a portion of it, a little portion of it.

Q. 14. The way it had separated from the other rocks you didn't think it was safe?

A. A portion of it.

Q. 15. If it had slipped away from another rock, it was the rock that was exposed to view in the side of the cliff, wasn't it?

A. Yes, sir, I suppose so.

Q. 16. The rock was laying along the side of it?

A. Along the side of the hill, didn't lay diagonally in the hill, laid along the side of the hill, in the cut, the rock did.

Q. 17. Which rock was it that laid that way?

A. The one that fell out.

Q. 18. The one that fell out?

A. Laid on the side of the hill. Laying down in the side of the hill, wasn't diagonally in the hill—the end of it.

Q. 19. Which end, the upper end?

79 A. The lower end of it was covered with earth, coming to town.

Q. 20. How much of the rock was exposed?

A. I said four or five feet of the side of it, the edge, I mean.

Q. 21. How far did that stick out from the side of the hill?

A. You mean the whole rock—say here was the rock here, it extended out four or five inches—slipped over towards the railroad, is what I mean—at the end——

Q. 22. You say you could see four or five feet of the thickness of the rock, or the width?

A. The length.

Q. 23. Of the length, how much of the top of the rock could you see, the flat surface?

A. Couldn't see so much of the top, covered with earth.

Q. 24. Give an idea about how much of the top of the rock was exposed?

A. I can't say, never measured it, the upper corner was naked——

Q. 25. Your best judgment?

A. I can't say how much there was.

Q. 26. The top of that rock was 6 feet by ten feet, I believe is the dimensions given by the witnesses, that would be 60 square feet, now how much of that surface could you see?

A. I could see four or five feet of the length of *ti* running down the river.

Q. 27. How much of the top—square feet?

A. The top wasn't naked at all, except a small portion of the upper end.

Q. 28. A small portion at the upper end exposed to the naked eye?

80 A. Yes, sir.

Redirect examination:

Q. 1. Standing down on the railroad track the top of the rock could be above your head, wouldn't it?

A. O, yes, yes, sir.

Q. 2. And you could see four or five feet of it extending along on the side of the slope?

A. Yes, sir.

Q. 3. The lower four or five feet was covered with dirt?

A. Yes, sir.

Q. 4. And where the rock had broken loose from the ledge, between the ledge and the rock was a space of four of five inches?

A. Yes, sir.

Recross-examination:

Q. 1. The elevation of the rock from the railroad track was about four or five feet?

A. Yes, it would have been that far up.

The witness, JOHN FORTUNE, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Your name is John Fortune?

A. Yes, sir.

Q. 2. Where do you live?

A. Live in Oakland Addition to Catlettsburg.

81 Q. 3. How long have you lived there?

A. About 20 years.

Q. 4. How near do you live to what is known as England Hill Cut, on the railroad?

A. About a quarter of a mile, I reckon, from my house.

Q. 5. You remember of a freight train that was derailed up there several years ago?

A. Yes, sir.

Q. 6. Before that accident—that wreck—had you ever had occasion to pass along the railroad and through that cut there?

A. Once in awhile I would pass up and down, yes.

Q. 7. Had you—how long before that wreck had you passed through it?

A. Well, I can't say exactly how long.

Q. 8. Well, was it a short while or a long while?

A. Yes, it was a short while.

Q. 9. About what was the height of that cut?

A. Well, I suppose it was something like 15 or 20 feet, might be twenty some thing.

Q. 10. What kind of material was in the cut?

A. Mixed up with all kinds of rocks.

Q. 11. All kinds of rocks and dirt?

A. Yes, slate and some hard rock and dirt.

Q. 12. Was it sand stone or lime stone?

A. Yes, sand stone.

Q. 13. Was there any soap stone in it?

A. Yes, there was soap stone in it.

Q. 14. Had you ever noticed any of the soap stone material or dirt slipping out of that slope?

A. Why, yes, now and then I had noticed it.

Q. 15. You had noticed it?

A. Yes.

82 Q. 16. Was there any rocks in the slope?

A. Yes, some. There was rock in there.

Q. 17. What size rocks?

A. Different sizes.

Q. 18. Before this wreck, did you notice any rock that differed from the other rocks, in any way, and if so tell the jury, if your attention was attracted to it?

A. Well, I noticed a right smart sized rock that laid in the bluff like.

Q. 19. What attracted your attention to it?

A. I don't know, I just happened to be passing and happened to notice it.

Q. 20. What caused you to notice it?

A. I just thought it had slipped out of the bluff, you know.

Q. 21. It had slipped out of the bluff and that was what attracted your attention to it?

A. Yes, sir.

Q. 22. How far had it slipped out?

A. I can't say exactly, "shoved" out a right smart, kinda leaning against the bluff like.

Q. 23. Loose from the rest of the bluff?

A. Looked like it to me.

Q. 24. What space, if any, was there between it and the rest of the bluff there?

A. I couldn't tell exactly how much.

Q. 25. Was there any space?

A. It seemed to be laying out from the dirt and slate like.

Q. 26. What position did it occupy in the cut, this large rock?

83 A. Well, this rock you speak about, it lay in a kind of an angling shape against the hill like.

Q. 27. Was there dirt over any part of it?

A. I can't say might have been some dirt at the lower edge of it.

Q. 28. About how much of the rock was exposed there?

A. Well, there was, I suppose, four or five feet wide, and I reckon eight or ten feet long, probably.

Q. 29. You could see that much of it?

A. Yes.

Q. 30. Four or five feet of the width?

A. Yes.

Q. 31. And eight feet of the length?

A. Six to eight feet of the length.

Q. 32. Had that rock changed any in position during the time you noticed it there?

A. No, I don't remember noticing it only the one time in passing it.

Q. 33. You noticed that it had slipped from the rest of the bluff?

A. Yes. Had come out from the rest of the bluff there, had slipped down.

Q. 34. About how long before the accident was it that you noticed it in that condition?

A. Well, I can't say exactly.

Q. 35. About how long?

A. The accident happened in May, about the first of May——

Q. 36. May, 12th?

A. Probably, it might have been April when I was along there, but I generally go around up there a good deal in the Spring of the year looking after business.

84 Q. 37. Was there any thing about the base that it was laying on that indicated to you that the rock might fall?

A. Well, it was laying kinda with a foot hold in the bank, like soap stone you might call it—it didn't seem to be laying right.

Q. 38. A slaty loose material under it?

A. Yes, sir, there was a kind of soap stone under it, there was a little "grain" of coal under there. Of course always slate and soap stone about a coal bank.

Q. 39. Did you ever see that rock after the wreck?

A. Yes, sir.

Q. 40. Where was it?

A. It was on the lower side of the road.

Q. 41. You saw them when they were taking it off the track?

A. No, sir, I didn't see it, I was on top of the hill. Wasn't down at the railroad at all. I saw the wreck laying there.

Q. 42. When was that, the next morning?

A. Next morning, yes, sir.

Q. 43. Could you see that rock?

A. I didn't notice the rock at all.

Q. 44. You were up on the hill?

A. Yes, saw some people around down there, I didn't go down among them.

Cross-examination:

Q. 1. How far above the track was this rock that you speak of?

A. Above the level of the track?

Q. 2. Yes?

A. I suppose two feet, or more.

Q. 3. The bluff at that point was almost straight up and down was it not?

A. Well, it leant back a little bit, sloped back some.

85 Q. 4. It sloped back some, but not very much was it?

A. No, pretty near a square cut of course it sloped some.

Q. 5. Describe the position of this rock to me again, will you?

A. The size of the rock?

Q. 6. The rock itself, the way it was in the hill?

A. It was about four or five feet wide, and eight or ten feet long.

Q. 7. How much of the rock could you see?

A. That is all I could tell about, what I could see couldn't tell any thing about what I couldn't see, only guess work.

Q. 8. Just consider for a moment the top of this table, this is the length of the rock and this is width?

A. I understand.

Q. 9. And this is the thickness and then the top surface, of course, was about as long as this is wide?

A. Yes, sir.

Q. 10. Just show the how the rock extended into the hill, to the jury?

A. Well, it didn't—It laid up against the hill like.

Q. 11. Laid up against the hill on its end?

86 A. "Kinda" leant up like.

Q. 12. The- if I take the top of this table and lean *up* up like that against the side of the room would that be the position it was in? (Indicating.)

A. Well, "kinda" sloped like, leaned back against the hill.

Q. 13. Then what you mean to say to the jury is, that if I take this top of this table and lean it up against the side of the house there, *what* would be the position the rock was in that what you want the jury to understand as being the position of the rock?

A. It wasn't perpendicular, the side of the house is perpedicular, and the bluff up there is sloped.

Q. 14. The- it laid on the slope there, whatever slope there was?

A. Yes, sir.

Q. 15. How much of the top surface of that rock was exposed to view?

A. I think four or five feet wide and about eight or ten feet long.

Q. 16. Then you could see sixty square feet of the surface of the rock on top, that what you mean?

A. Standing on the track, could see up on the bank.

Q. 17. Standing on the track looking at the rock cliff you could see about 60 square feet of its top surface?

A. I suppose so, I made no estimate of it.

The witness, JOE LIKENS, being first duly sworn, testified as follows, to-wit:

87 Direct examination:

Q. 1. Where do you live?
A. I live up on the Sandy road here.
Q. 2. About how far from the England Hill cut?
A. O! About a mile, may be a little more—about a mile.
Q. 3. A mile above it or below it?
A. Above it.
Q. 4. You live along the line of the Chesapeake & Ohio Railway?
A. My land goes to the road.
Q. 5. Your land goes to the railroad?
A. Yes, sir.
Q. 6. Is that cut between your home and Catlettsburg?
A. Yes, sir.
Q. 7. In going to and from Catlettsburg, do you pass along the railroad and through that cut?
A. Which?
Q. 8. When you would go to Catlettsburg, from your home would you go through the cut?
A. Yes, sir, I could go around.
Q. 9. You walk the railroad, and go through the cut?
A. Yes, sir.
Q. 10. And how long have you been accustomed to passing through that cut?
A. Ever since it was made, I hauled feed and stuff to the railroad when they was making it.
Q. 11. You remember the time when the freight train was derailed and Mr. Dwyer was killed?
A. I just didn't keep any account of it, 1910, I think it was.
88 Q. 12. You remember that it happened?
A. O, yes, I was down there next day and saw the wreck, I see it about two times a week, going to town and some times six.
Q. 13. Now just describe to the jury, Mr. Likens, that cut, as best you can—the material in it?
A. How long and how high or what?
Q. 14. How long and how high and what material it was made of?
A. Well, the cut would be right some thing near 20 feet——
Q. 15. 20 feet high?
A. Would be that high, the best of my judgment.
By the Court: How long was it?
A. Well, it will average about, from thirty to thirty-five T. rails in length.
Q. 16. What kind of material in that slope?
A. You mean in the cliff?
Q. 17. Yes.
A. Soft places and hard places, and like that?

Q. 18. What kind of rock, if any?

A. Well, there is hard rock and soft rock.

Q. 19. Lime stone or sand stone or shale?

A. Kind of a slate*ly* rock, and ore beds and such as that, mixed with hard rock.

Q. 20. How far back from the railroad track does this slope begin—the lower part of the slope, how far is it from the rail-road?

A. You mean sloped back that way? (Indicating.)

Q. 21. From the railroad track?

A. I know, it is pretty near straight up and down until you get to the top of it.

Q. 22. How wide is the ditch between the railroad and the hill?

89 A. It is very narrow.

Q. 23. About how much?

A. I suppose, would be five or six feet on a side, not over that.

Q. 24. Before this wreck occurred had your attention been drawn to any rock in that cut that laid different from the others in the cut?

A. Yes, sir—This here one that fell in, I have noticed that rock.

Q. 25. How came you to notice it?

A. O! I would be passing there, may be I would stop there and just look around and just notice it like anybody would.

Q. 26. What attracted your attention about it, that it was different?

A. Well, it just looked like a rock that was dangerous, might fall down there and cause a wreck.

Q. 27. What made it look dangerous?

A. Just because it was up there against the side of the cliff.

Q. 28. Did it look like it was attached to the cliff so that it would not fall?

A. No, sir, it wasn't attached to the cliff, because it was loose from the cliff.

Q. 29. And how far from it?

A. You could see it had dropped down and hung out away from it, about five or six inches, the other end that laid against the cliff, not loose.

Q. 30. The upper end was five or six inches from the cliff?

A. Yes, "Sorter" dropped down that way from the cliff up the river——

90 Q. 31. Was it a part of a ledge of rocks or loose there in the dirt, the rock that fell, this big rock?

A. It was different, laid up against the side of the cliff there and the other end it run in there enough to keep it from slipping out it looked like that end that hung against the cliff——

Q. 32. That was the lower end?

A. Lower end, this way.

Q. 33. How much of the rock could you see—I understand you to say that there was a space of between five or six inches, between the cliff and the rock at the upper end?

A. Five or six, between five and six inches wide.

Q. 34. How much of the rock could you see?
A. About half of the length, could see the full width——
Q. 35. What about the width of it?
A. I would say it would be about the same width clear through.
Q. 36. Could you see the whole width of it?
A. Yes, the upper end was naked, see the whole width of it, run the same width all the way——
Q. 37. About what size was the rock?
A. You mean how wide?
Q. 38. And how long and how wide?
A. Well, it would average right about ten feet long, now, looks like, been broke when they got it off the track, out of the cut.
Q. 39. That long where it is laying now?
A. Yes, sir, some thing near ten feet now.
Q. 40. Where is it laying now?
A. Right there on the side of the track, on the side of the
91 dump.
Q. 41. Was it larger when it was in the slope?
A. Yes, been a whole lot of it broke off.
Q. 42. You know who broke that?
A. I guess the [illegible]road company broke it when they lifted it out with the derrick, I don't suppose anybody else would.
Q. 43. You don't know who did that?
A. No, I don't know who broke it, don't know it was broke, of course.
Q. 44. Now how long before this wreck had you noticed this rock in that condition?
A. I noticed it every time I passed, just be walking along there.
Q. 45. How long a period of time before the wreck had you noticed the rock in there in that position?
A. I don't hardly know, been a right smart bit, for a year or more kept springing out there a little all the time.
Q. 46. Show any change in position during the time you noticed it?
A. Yes, sir, kept springing out, a man could tell that if he noticed it—I noticed it.
Q. 47. About how far above the level of the track was this rock in the slope?
A. You mean from the "T" rail?
Q. 48. Yes.
A. Where it lay up in the cliff?
Q. 49. Yes.
A. Between eight and nine feet.
Q. 50. Above it?
A. Up on the cliff.
92 Q. 51. Was that on the right of way of the railroad company there?
A. Yes, sir.
Q. 52. Did you ever hear the railroad section foreman up there say anything about the condition of that rock?
A. Me and George Arthur when he was section foreman up there,

was talking a little about it, and he said he always kept somebody to notice it of a bad night.

Q. 53. He said he always kept somebody to notice it of a bad night and he was section foreman?

A. He was section foreman at that time, but he wasn't section foreman there at the time it slipped in.

Cross-examination:

Q. 1. Where is George Arthur?

A. Well, sir, I guess he is under the ground?

Q. 2. Dead?

A. Yes, sir.

Q. 3. You think that rock is close to ten feet long now, you say

A. Yes, sir.

Q. 4. And that it must have been longer when it was in the hill?

A. Yes, sir, it was longer.

Q. 5. Because a portion of it has been broken off?

A. Yes, sir.

Q. 6. And that it is about six feet wide?

A. Yes, sir, if laid in straight, right close to six feet.

Q. 7. And about two feet in thickness all the way through?

A. About two feet thick from the looks of the rock, any way.

Q. 8. You could not tell how thick it was before it came out of the cliff, could you?

93 A. No, sir, I could not tell how thick it was before it came out, only at the upper end, don't know how far it was back in the cliff.

Q. 9. Laid back in the cliff, wasn't it?

A. Back against the side of the cliff, right that way. It didn't lay in the cliff, laid right against the side of it.

Q. 10. Why couldn't you tell how big it was?

A. If it had been out from under the dirt you could have told.

Q. 11. Then it was back in the cliff, wasn't it?

A. Until it slipped out, it was.

Q. 12. How far did you say it was from the T trail as you call it up to where this rock was?

A. Well, between eight and nine feet, laid right up against the side of the cliff, didn't lay up and down the cliff, laid right against the side of the cliff——

Q. 13. Didn't stand up on its end?

A. No sir.

Q. 14. Laid lengthwise.

A. Yes, sir, lengthwise. Laid back against the cliff—laid rather right up on its long end, long side of it that way—(indicating) and was covered by dirt and dropped down——

Q. 15. Down this way?

A. No, sir.

Q. 16. And it had not fallen from the cliff?

A. No, just stood out there——

Q. 17. And that was a point eight or nine feet from the railroad track, up above?

A. I suppose—my estimate, it would be eight or nine feet in the cliff—straight up and down.

94 Q. 18. Which part of it could you see there in the cliff?

A. Which part of what?

Q. 19. Of this rock, could you see the end of it, couldn't you?

A. Yes, sir.

Q. 20. Where was the other end?

A. Back against the sliff, as I told you?

Q. 21. Under the ground?

A. Back against the side of the cliff?

Q. 22. Back in the cliff?

A. No, it wasn't in the cliff—if it had been in the cliff, it wouldn't have fallen——

Q. 23. Didn't you say before that it was in the cliff?

A. No, sir, I didn't.

Q. 24. I am reading the transcript from the notes of the stenographer taken on the other trial. I will ask you if this question wasn't asked you and if you didn't make this answer:—I am going to read the official stenographer's report of your testimony on the former trial. Wasn't this question asked you, and didn't you make this answer: "Q. 27. Which part of it could you see? A. One end. Q. 28. It had two ends? A. Yes, sir. Q. 29. Where was the other end? A. Under the ground. Q. 30. Back in the cliff? A. —. Q. 31. That rock was part of the formation of the cliff, wasn't it? A. Of course. It gave away from that cliff as a matter of course." Wasn't those questions asked you before and didn't you make those answers just as I have read them to you?

A. How is that?

Q. 25. So I have to read them again to you, do I? I will read them again and I want you to pay close attention. Wasn't you asked this question and didn't you make this answer "Q. 27. Which part of it could you see? (Meaning the rock) A. One end?

A. Yes, sir.

95 Q. 26. And then wasn't this question asked you, "Q. 28. It had two ends?" and didn't you make this answer, "Yes, sir,"? "Q. 29. Where was the other end? A. Under the ground? Q. 30. Back in the cliff? A. Yes, back there, of course. Q. 31. That rock was part of the formation of the cliff, wasn't it? —. Of course, it give away from that cliff as a matter of course." Were those questions asked you and didn't you make the answers that I have just read to you? That is on the other trial of this case?

A. Back against the cliff——

Q. 27. You can answer what I want to know by yes or no. On the last trial, whether or not you made those answers, to those questions?

A. It was back against the cliff——

Q. 28. Then you don't want to say whether you testified that way at the other trial of this case or not, what I have read?

A. I told you it was right back against the side of the cliff, that is the way it stood all the time, under the dirt—It didn't stick in the hard dirt.

Q. 29. And wasn't this question asked you before and didn't you make this answer;—"Q. 31. That rock was part of the formation of that cliff wasn't it? A. Of course. It give away from that cliff as a matter of course." Wasn't that question asked you and didn't you make that answer? Were you not asked what I have read to you and did you not make those answers?

A. I have told you what I knew about the rock.

By the Court: Answer it yes or no?

A. Of course, I made some of them, I guess.

96 Q. 30. The end of it was under the ground any how, wasn't it?

A. Yes, sir.

Q. 31. And to get under the ground didn't it have to go back on the cliff?

A. Back against the side of the cliff.

Q. 32. If it was back against the side of the cliff, wasn't under the ground was it?

A. Yes, one end of it. There is where it held.

Q. 33. One end of it was back under the cliff?

A. Against the cliff—of course there could be loose dirt on that end—could be up against the cliff.

The witness FLOYD SCHUMP, being first duly sworn, testified as follows to-wit:

Direct examination:

Q. 1. Where do you live?

A. Ashland.

Q. 2. What is your occupation?

A. Engineer.

Q. 3. For whom?

A. C. & O.

Q. 4. Were you on the train that was wrecked up here at England hill cut in May 1910?

A. Yes, sir.

Q. 5. What were you doing?

A. Fireing.

97 Q. 6. What kind a train was it?

A. Freight.

Q. 7. Double header, was it?

A. Double header.

Q. 8. You mean by that that there was two engines pulling the train.

A. Two engines.

Q. 9. Which engine were you fireing?

A. Fireing the head engine.

Q. 10. Who was your engineer?

A. Diamond.

Q. 11. Who was engineer on the second engine?

A. Dwyer.

Q. 12. Richard Dwyer?

A. Yes, sir.
Q. 13. Who was his fireman?
A. Gayhart.
Q. 14. You were working for the Chesapeake & Ohio Railway Company at that time?
A. Yes, sir.
Q. 15. Were these engines derailed there at England Hill cut there, at that time?
A. Yes, sir.
Q. 16. What caused that wreck?
A. A rock and slide on the track.
Q. 17. From the cut?
A. From the cut.
Q. 18. What time of night was it?
A. About 1:25.
Q. 19. Was the train going down?
A. Going west.
Q. 20. Where had it started from?
A. Shelby.
98 Q. 21. On its way to Ashland and Russell.
A. Russell.
Q. 22. When the train—the front engine, the one that you were on, did it hit that rock?
A. Yes, sir.
Q. 23. What did you do?
A. Jumped off.
Q. 24. What became of the second engine?
A. The second engine went towards the cut, towards the bank.
Q. 25. Which way did the front engine go?
A. Went to the road——
Q. 26. Which way did the front engine turn?
A. Towards the river.
Q. 27. Which way did the second engine turn?
A. Towards the hill, the second one didn't turn over, left the track that way.
Q. 28. It left the track, but wasn't turned over?
A. No.
Q. 29. What became of Mr. Dwyer?
A. Why he got down by the side of the fire box and was killed.
Q. 30. And he was by the side of the fire box of the second engine and was carried to Mr. Compton's house and died there?
A. Yes, sir.

Plaintiff at this point introduced in evidence Dr. Wigglesworth's mortality tables, showing the expectancy of life at 45 years of age to be 23.92, and 43 years of age the expectancy of life is 24.77 years.

99 By the Court: The statement as to what the life tables show as to the expectancy of life of the deceased, Richard Dwyer, and his wife, is to be considered by you in connection with the state of health and habits of the deceased and the plaintiff as to

the probable duration of their lives and is to be considered for that purpose only.

The foregoing was all the evidence offered or introduced by the plaintiff in chief, and thereupon the defendant moved the Court to peremptorily instruct the jury to find for it, to which motion the plaintiff objected, and the Court upon consideration of said motion and objection overruled said motion and sustained said objection, to which ruling of the Court, the defendant excepted.

Thereupon the defendant introduced the following evidence to sustain the issue in its behalf. First the witness, BARNEY WELLS, being first duly sworn testified as follows, to-wit:

Direct examination:

Q. 1. How old are you?
A. 44.
Q. 2. Where do you live now?
A. I live in South Catlettsburg, Hampton City, rather.
Q. 3. What is your occupation?
A. Section foreman.
Q. 4. For the Chesapeake & Ohio Railway Company?
A. Yes, sir.
Q. 5. What comprises your section, what proportion of the road?
A. Six miles—for six miles of track.
100 Q. 6. From where?
A. From Big Sandy Junction, to mile post 6.
Q. 7. Does that Section include what is called the England Hill cut?
A. Yes, sir.
Q. 8. Were you in charge of that section in the year 1910, the month of May, 1910?
A. Yes, sir.
Q. 9. You remember the time of the derailment of a freight train going towards Catlettsburg, from which Dwyer received injuries which resulted in his death?
A. Yes, sir.
Q. 10. In the England Hill Cut, now describe to the jury as near as you can the formation of the England Hill cut.
A. Well, England Hill cut is about 300 feet long—that is the cut is, and the cut on the left hand side is about—well, it runs all the way from 5 to 15 feet high, and on the right hand it runs from five to six feet, or may be seven feet high.
Q. 11. The right hand side, you are speaking of the right hand side coming this way?
A. Yes, sir, river side.
Q. 12. The left hand side you speak of, that is the hill side?
A. Yes, sir.
Q. 13. The height of the cut on the hill side runs from five to fifteen feet?
A. Yes, sir, may be some places more, never measured it, fifteen feet in heighth——

Q. 14. What is the character of the rock in that cut, in the hill side?

A. Rock mostly all the way through there, it lays in seams, the rock does—part slately rock and part hard rock, I don't
101 know whether to call it lime stone, or lime sand stone, but it is a pretty hard rock through, it lays in seams.

Q. 15. You say it lays in seams, how does the hard rock lay in the hill, also the slately formation?

A. Well, it lays in the hill that way—(indicating)—with the edge out that was.

Q. 16. The edge projecting out?

A. Yes.

Q. 17. You remember the rock that was taken away from the track the morning after the derailment?

A. Yes, sir.

Q. 18. That rock form a part of the cliff formation there in that cut?

A. Yes, sir.

Q. 19. Whereabouts was that rock?

A. It was in the West end of the cut, towards Catlettsburg.

Q. 20. That is the end towards Catlettsburg?

A. Yes, sir.

Q. 21. About how high up was it?

A. It was about seven feet from the top of the rail.

Q. 22. Describe to the jury just how that rock laid in the cliff.

A. Well, the rock laid in the cliff this way, (Indicating) with its upper corner showing out, the dirt and slate rock on top this way and under here was an air slack of material and it just crumbled from that air slack——

Q. 23. What were the dimensions of the rock?

A. I believe the rock would be about eight feet long, about four feet wide and—about 18 inches thick, may be two feet.

102 Q. 24. You say I believe, that one corner of it projected out?

A. Yes, one corner projected out.

Q. 25. That is, of the side of the cliff?

A. Yes, sir.

Q. 26. That cliff is of a rocky formation, slately?

A. Yes, sir.

Q. 27. Corner sticking out, that would be the way of it?

A. Yes sir.

Q. 28. Which corner projected out, the West corner or the east corner?

A. East corner.

Q. 29. That the part that was coming out?

A. The east corner—that is the lower corner—that was the one that showed.

Q. 30. The East end is the end up the river?

A. Yes, sir.

Q. 31. Underneath that, it projected back in the hill?

A. Yes, you couldn't tell how far the rock laid back in the hill until after it fell out.

Q. 32. This large rock, and if it was flat, it extended back into the hill just as that shows it, this piece here shows it exactly? (Indicating.)

A. Yes, sir.

Q. 33. Now how often did you go through that cut?

A. Probably I went through twice a day. My work was all on the East end nearly, but a short distance this way, wasn't very much work to do on the west end of the section, always worked East,—Just East of the tool house I suppose, 500 feet may be, 1500 feet West of the tool house.

103 Q. 34. What was the last trip you made through there before the derailment?

A. The last time, I suppose I was through there, was about 5:15 in the evening.

Q. 35. I forgot to ask you, when you took charge of that section?

A. I taken charge September 5th, or 6th, before this accident happened in May.

Q. 36. You say you took charge September 5th, 1909?

A. Yes, sir.

Q. 37. And this derailment occurred May 12th, 1910?

A. Yes, sir.

Q. 38. You had been working there six or eight months at the time of the derailment?

A. Yes, sir.

Q. 39. And it was a part of your duties to look after the cuts?

A. Yes, sir.

Q. 40. And the condition of the rocks in them?

A. Yes, sir.

Q. 41. During that six or eight months had there been any falling of the rock on the track there?

A. No, sir, no rock hadn't fallen, had I never seen it.

Q. 42. While section foreman, prior to the time of the derailment were you ever on top of the cliff?

A. Yes, I was on the cliff, I couldn't tell you just how many times, had been there more than once all along on top of the cliff.

Q. 43. Any thing there to indicate to you that this rock in question was not safe?

A. Not a thing.

104 Q. 44. What caused the rock to fall?

A. Well, sir, I took it the dirt on top of the rock being so heavy, the air slack came in it about where this seam was, it got top heavy and it dropped off.

Q. 45. Could you see that seam?

A. No, sir, you could tell there was a seam of rock, but there wasn't any openings in it.

Q. 46. You say the dirt on top kept coming down on the rock?

A. Yes, sir.

Q. 47. Had it been raining any just before that?

A. Yes, sir, had been raining some that night, a kind of drizzling rain.

Q. 48. You were there after the accident?

A. Yes, sir.

Q. 49. Say whether or not there was any dirt on the track?

A. Yes, sir, there was some dirt and small rock on the track.

Q. 50. Where did the dirt come from?

A. Some above the rock, and some below, right smart little pile of it.

Q. 51. This heavy rock, was it struck by the train?

A. It was struck by the rear engine, I don't think that the front engine ever struck the big rock.

Q. 52. Was there another rock that fell out?

A. Yes, sir, but the small rock laid under the big one.

Q. 53. Both came out of the cliff?

A. Yes, sir.

Q. 54. Did the small rock lay over the track?

A. Yes, sir, it was more of a slate rock than the other.

105 Cross-examination:

Q. 1. It was your business to look after the safety on the track on the right of way for this space of six miles?

A. Yes, sir.

Q. 2. How many men help you in that work?

A. I believe I had five men at the time.

Q. 3. Five men?

A. Yes, sir.

Q. 4. Did you notice this big rock in the side of the cut there as you would pass through it?

A. Yes, sir, I noticed it, the part of the rock that was showing.

Q. 5. How many times did you notice it in passing through the cut?

A. Well, practically every time I went through the cut, I would notice it, noticed the rock in the cut every time I went through there.

Q. 6. You looked at this rock every time you went through the cut?

A. I don't know that I looked at that one any more than the rest of them, just noticed how the rocks were there all the way through.

Q. 7. How are you enabled to remember about the position of this rock in the fall?

A. Well, I know it fell, and naturally one would remember it, have an accident like that he would remember it.

Q. 8. You went there after the accident?

A. Yes, sir.

Q. 9. You say the end up the river was exposed?

A. Yes, sir, it was showing, couldn't see it all, could see the end of it, East end, couldn't see the west end but the rock was showing——

106 Q. 10. The rock was practically all back in the hill, horizontally?

A. Yes, sir, back in the hill.

Q. 11. And considered a part of the ledge, or cliff there?

A. Yes, sir.

Q. 12. It was covered with dirt?

A. Yes, sir, and slate rock.

Q. 13. I understood you to say that dirt falling down on it, broke it loose?

A. It was the dirt on top—I think the weight of the dirt on top caused it to break loose.

Q. 14. Also dirt under the rock?

A. No, sir, no dirt under the rock.

Q. 15. The side of the rock was exposed?

A. Yes, a part of it.

Q. 16. How far was that rock projected over?

A. About a foot.

Q. 17. In going along the rail-road you could see this long rock in the hill, projecting out about a foot, and this pretty heavy weight on top of it?

A. Yes, sir.

Q. 18. What caused it to project out the way you say it did?

A. I couldn't say unless it was that the slate and coal material under it had air slacked and fell out.

Q. 19. Slate and coal under it?

A. Yes, sir.

Q. 20. What is the effect of the elements on slate and coal?

A. I couldn't hardly say.

Q. 21. Air slack, or whatever you call it?

A. Air slacked slate will crumbly.

Q. 22. Cause it to crumble and wash out?

107 A. Yes, sir.

Q. 23. How long had you noticed that this slate and coal under this rock had been air slacking and crumbling?

A. Well, there wasn't enough to notice it—wasn't enough to notice that it was falling at any time.

Q. 24. But it had fallen out from there, hadn't it?

A. It had fell some, yes.

Q. 25. You say it was air slacked and kept crumbling out—it was your judgment as you went along that it was air slacking and crumbling a little?

A. I couldn't see anything fall in the ditch to fill up the ditch, wasn't anything fell to amount to anything.

Q. 26. It kept crumbling all the time you passed there?

A. I suppose it did. Wasn't enough to fall in the ditch to amount to anything.

Q. 27. What do you mean by not to amount to anything?

A. To fill the ditch so we would have to clean it out.

Q. 28. But there was some fell, enough for you to notice it?

A. A small bit, didn't enough fall to have to clean it out.

Q. 29. But any how it kept falling?

A. Yes, sir.

Q. 30. A little bit of stuff would fall?

A. Yes, sir.

Q. 31. And you saw that it came from under this big rock?

A. I couldn't tell the rock was giving away——

Q. 32. Didn't you say you noticed the crumbling under this big rock, that it was coming from there?

A. Well, a small bit I said, not enough to have to clean the ditch out.

Q. 33. How many times did that happen? How many times did you notice that it had air slacked and that stuff had fallen down in the ditch?

108 A. I couldn't say.

Q. 24. Didn't you notice it off and on during all the time you were passing through that cut?

A. I noticed, the rock, yes, sir.

Q. 35. Didn't you notice the air slacking of this stuff under it?

A. Not enough to amount to anything, to have to clean the ditch out during that time, under this rock, didn't have to clean the ditch out.

Q. 36. You testified in this case once before, didn't you?

A. Yes, sir.

Q. 37. I will read—to you from the official stenographer's report of that trial and ask you if you wasn't asked these questions on—the other trial—and didn't you make these answers: "Q. 5. Would you notice the rock when you passed there? A. Yes, sir. Q. 6. Ever notice this rock when you passed there? A. I wouldn't look at it any more than the rest. Q. 7. You noticed the rock when you passed? A. Yes, sir. Q. 8. You noticed the dirt coming from up there? A. I noticed the air slack, some little bit, yes. Q. 9. It kept crumbling all the time you passed there? A. Yes. Q. 10. Under this rock? A. All along under this heavy rock, it would crumble. Q. 11. That continued from the time you commenced up there until it fell. A. O, no, I couldn't say it continued all the time." Did you answer those questions that way?

A. I suppose I did.

109 Q. 38. And that is a fact?

A. Yes, sir, that is a fact.

Q. 39. Now this air slacking process continues along in wet weather as well as dry weather?

A. Yes, sir, it continues in dry weather as well as wet weather, a continuous process.

Q. 40. Did you go up and sound this rock?

A. Yes, sir, I was on this rock—more than once——

Q. 41. You was on this rock?

A. I was on this one and the rest of them, not all, of them, more than once.

Q. 42. When was that?

A. I can't say, some time before this accident happened.

Q. 43. Considerable time before, wasn't it?

A. I couldn't say, just how long before.

Q. 44. How came you to go on this rock?

A. I went up there to see if there was anything giving away on top of the cut, from one end to the other.

Q. 45. Did you go on this particular rock? Why did you go on it?

A. I didn't go on this particular rock any more than the rest.

Q. 46. You don't remember whether you went on it or not?

A. Yes, sir, I was on it.

Q. 47. You was on this rock?

A. Yes, sir.

Q. 48. How far were you from the track when you were up there?

A. I was just as close to the edge of it as I could get without going over, on the steep part——

110 Q. 49. You were on the hill side, beyond the top of the cut?

A. I was on the top of the cut.

Q. 50. You couldn't see under the rock from there?

A. Not from the top, I couldn't.

Q. 51. Could you see the rock at all from there?

A. From the top.

Q. 52. Yes.

A. I could see the upper corner, sticking out, so that I could see a small bit——

Q. 53. You noticed the upper corner of this rock, which was sticking out? It was part of your business to take down rocks and other material in cuts that might endanger the safety of the railroad?

A. Yes, sir, anything I thought was dangerous, my duty to take it down.

Q. 54. But you didn't try to take this rock down?

A. No, sir. I thought this rock was safe.

Q. 55. I didn't ask you that, I asked you if you tried to take it down?

A. No, sir, I did not.

Q. 56. This England Hill cut was known as a dangerous cut wasn't it?

A. Well, there hadn't been anything at all fallen since I had taken charge, used to be dangerous——

Q. 57. Didn't they keep a watchman for the cut?

A. Never kept any watchman——

Q. 58. It was dangerous in May, 1910, wasn't it?

A. It was dangerous on that night, I don't know——

111 Q. 59. But it was known as a dangerous cut, wasn't it?

A. Hadn't been any watchman there, wasn't considered dangerous.

Q. 60. Say whether or not it was known among the section hands and the employes of the Company as being a dangerous cut?

A. Well, I couldn't say.

Q. 61. You knew that stone and dirt had fallen out of this cut before, didn't you?

A. I knew it had fallen out before, yes, sir.

Q. 62. Several times before this accident.

A. Yes, sir.

Q. 63. What would have been the method, according to your instructions of getting that rock out of that slope?

A. We could have took a drill and went in and drilled a hole and shot the rock out.

Q. 64. With dynamite?

A. Yes, sir.

Q. 65. Wouldn't have taken but a few minutes?

A. No, sir, wouldn't have taken but a few minutes.

Q. 66. I believe you say there was a small rock that fell at the same time that the large one did?

A. Small rock came out, laying there, don't know that it fell just at the same time, might have dropped before or later, it was there with the large rock.

Q. 67. Both came down together?

A. Yes, sir, they were both together.

Q. 68. Just before you took charge there as section foreman there had been a bad slip in that cut, hadn't there?

A. On the East end, I heard the men that worked for me say, sometime before I came, there had been a rock fall out on the East end.

112 Redirect examination:

Q. 1. The projection of the rock, where you speak of, you could see, and had seen the corner of the rock there?

A. Just the corner projected out, yes, sir.

Q. 2. You went over all the cliff, you went over the top of it from one end to the other?

A. Yes, sir.

Q. 3. And over all the rocks, in connection with your examination of the cut, the hill side?

A. Yes, sir.

Q. 4. This crumbling you speak of in the side of the cut, was a gradual crumbling away?

A. Yes, sir.

Q. 5. That was true, through the whole cliff?

A. Yes, sir, no more on this one than the rest of them.

Q. 6. That happens in any cliff with a formation of that kind?

A. Yes, sir.

Q. 7. And this crumbling had not been sufficient to fill up the ditch before this accident, was it?

A. No, sir.

Q. 8. Or the ditch had not been opened, cleaned out?

A. No, sir.

The witness, JAMES MCGUIRE, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. What is your age?

A. 43.

Q. 2. Where do you live?

A. Ashland, Kentucky.

113 Q. 3. What is your present occupation?

A. Section foreman, Ashland Yards.

Q. 4. Section foreman in the Ashland Yards?

A. Yes, sir.

Q. 5. In May, 1910, what were you doing?

A. Supervisor of Track, Big Sandy Division.

Q. 6. That embraces what is known as the England Hill cut?

A. Yes, sir.

Q. 7. The cut in which the derailment occurred which resulted in the death of Mr. Dwyer?.

A. Yes, sir.

Q. 8. How long had you been Supervisor of Track of the Big Sandy Division.

A. About two years.

Q. 9. In the performance of your duties as Supervisor did you or not pass up and down the river on the track of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. 10. And through this cut, how often?

A. Why, three or four times a week.

Q. 11. Did you notice the England Hill cut on those trips that you made?

A. Yes, sir, I looked at it as I went through there.

Q. 12. You know the character and formation of the rocks in that cliff?

A. A little bit, yes, sir.

Q. 13. How were they—how did they rocks lay in the hill?

A. The rocks laid on a level, horizontally in the hill.

Q. 14. Flat ways?

A. Yes, sir.

Q. 15. Ledges of rock?

A. Yes, sir.

114 Q. 16. Did you ever walk along through the cut, or did you ride through on a train?

A. Rode through on a train, and walked through the cut too.

Q. 17. Did you notice that cliff and the sides of it—the rocks in the hill—that is next to the hill—notice this rock?

A. Yes, sir, I have noticed it.

Q. 18. Was there anything to indicate to you that this rock in question that fell down was dangerous?

A. No, sir.

Q. 19. Did you see that rock after it fell?

A. Yes, sir.

Q. 20. What was the size of it?

A. Why, it was about 8 feet long and 4 feet wide, and about 20 inches thick, along near about that.

Q. 21. How soon did you get there after the accident?

A. I got there about six o'clock the next morning.

Q. 22. What was on the track the next morning, I mean that came out of the hill side?

A. Rock and dirt.

Q. 23. Have you a judgment as to how that rock came to fall out of the hill—what caused it, to fall out of the hill?

A. It slipped from the top of the bank, pulled the rock out.

Q. 24. The dirt pulled it out?

A. Yes, sir, the dirt back of the rock pushed it out.

Q. 25. How much dirt was there on that track at that time?

A. There was about two feet.

115 Cross-examination:

Q. 1. You were Supervisor of Track from Ashland to Elkhorn City?

A. No, sir, from Hampton Junction.

Q. 2. About 118 miles?

A. Yes, sir.

Q. 3. You didn't give any particular attention to these different cuts?

A. I noticed them very closely to see if there was any danger, yes, sir.

Q. 4. Hundreds of cuts in that distance?

A. Yes, sir, quite a lot of them.

Q. 5. You never made any particular examination of this cut?

A. I didn't particularly examine it. No, sir, I didn't.

Q. 6. But you seen this rock in there that fell?

A. I don't know as I noticed this particular rock that fell, I noticed the rocks in there.

Q. 7. I believe this cut had a number of rocks in it, a ledge of rocks through it?

A. The rocks laid in there flat ways. Yes, sir, a ledge of rocks.

Q. 8. You are just speaking of the rocks generally that laid in there, you don't know if this rock was loose or not?

A. No, sir, I don't.

Q. 9. How was it laid in the hill?

A. It laid flat ways in the hill.

Q. 10. How do you know?

A. All of them did.

Q. 11. Was there a rock over this one?

A. I can't say if there was a rock over this particular rock or not.

116 Q. 12. You say it was a part of a ledge of rocks?

A. Yes, sir, it was on top—in this ledge——

Q. 13. This was on top, of the ledge—this rock?

A. Near the top of the cut, yes, sir.

Q. 14. Any rock over it?

A. I can't say positively there was or not.

Q. 15. Well, how do you know it was a part of a ledge unless you know that there was rock under it and another rock over it?

A. Yes, sir.

Q. 16. Wasn't there slate and coal under it?

A. There was some kind of a formation under there, I don't know what it is.

Q. 17. Was it a slatey substance—or a slate rock?
A. Slatey substance next to the bottom of the cut.
Q. 18. And next to this rock that fell out?
A. I couldn't say.
Q. 19. And you don't know if there was rock under it or not?
A. Rock under it, I can't say right exactly under the rock, dirt or rock, might be a few inches of dirt between that rock and another rock.
Q. 20. What was on top of this rock, dirt or other stuff?
A. Up the bank was dirt. Yes, sir.
Q. 21. Right next to it?
A. I can't say.
Q. 22. You don't know what was by the side of it?
A. No.
Q. 23. You don't remember if it was a part of a ledge, or a loose rock lying in that slope, you just gave your judgment generally—and you don't know how this particular rock was loose or not?
A. I couldn't say it was loose. No, sir.
Q. 24. You don't remember ever seeing this particular rock?
A. No. I don't know as I did.
117 Q. 25. Never saw it at all except as you passed through in the train, from the rear end of the train?
A. Yes, sir.
Q. 26. Going 25 or 30 miles an hour?
A. I don't know if it was going that fast or not.
Q. 27. That is the only inspection you gave it as you went through on the rear end of the train?
A. Yes, sir.

Redirect examination:

Q. 1. You saw it after it had slipped from the hill side?
A. Yes, sir.
Q. 2. Slides there where the rock came down?
A. Yes, sir, back of the rock.
Q. 3. You saw that cut the next morning and the slip in the hillside?
A. Yes, sir.

The witness, L. B. ALLEN, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where about are you located at present?
A. At Huntington, West Virginia.
Q. 2. Where were you located in 1910?
A. I was in Ashland—I was Division Engineer of the Ashland and Big Sandy Division, and was also Engineer of Maintenance of the Western Division.
Q. 3. Did you have charge of the track as Civil Engineer from Ashland up the Big Sandy?

118 A. Yes, sir.

Q. 4. What time did you leave that portion of the road?

A. May 1st, 1910.

Q. 5. That was just twelve days previous to the time of this accident?

A. Yes, sir.

Q. 6. How long had you had charge of that Division?

A. Yes, sir.

Q. 7. What is your profession?

A. Civil Engineer.

Q. 8. Are you acquainted with the cuts on the Big Sandy Division?

A. Yes, sir, I have a general knowledge of the Big Sandy Division from one to the other.

Q. 9. That knowledge includes what is known as England Hill Cut?

A. Yes, sir.

Q. 10. Describe to the jury the character of that cut?

A. Well, it is a rocky cut about 15 feet deep on the upper side, and 4 or 5 feet on the lower side and is a cut some six or seven hundred feet long.

Q. 11. Now what about the cliff on the hill side, that is with reference to the slope?

A. Well, it is an ordinary rock cut with a slope of—Well, between one foot and four, and two feet and four, just an ordinary rock slope cliff——

Q. 12. Was or not the slope the usual slope given for a slope of that kind, where the formation is such as that is, a rock cliff?

A. Yes, sir.

119 Q. 13. These kinds of cuts necessarily have rocks projecting out from the sides of them at times?

A. Yes, more or less rocks projecting out——

Q. 14. Impossible to make them out without having them that way is it not?

A. Yes, sir.

Q. 15. For how long and how often had you seen England Hill cut prior to the time you left that Division?

A. I went up that Division on an average once a week, passing back and forth through that cut.

Q. 16. In passing through it would you notice it and look at it?

A. Yes, sir. I always observed the cuts and the general character of the road all the way along. That was a part of my duties.

Q. 17. On the sides of the cliff next to the hill—anything there that indicated that there was any danger there of any rock falling out?

A. I never noticed any particular danger, or any special feature that that would call any particular attention to it.

Q. 18. As a matter of fact any thing in the hill side that would indicate any danger, in connection with any rock?

A. No more than the usual cuts, rock cuts.

Cross-examination:

Q. 1. What did you say your official title was?

A. Division Engineer—Engineer of Maintenance of Way, at the time the accident occurred. Just previous to that I had been Division Engineer, had charge of all the track men and track forces and the road bed in general.

120 Q. 2. In the performance of your duties you rode up and down the Big Sandy river on the railroad trains?

A. Yes, sir.

Q. 3. You never stopped at England Hill cut?

A. I have walked through England Hill cut a number of times-Don't remember of any special time though.

Q. 4. That was several years before this accident, wasn't it?

A. No. No, sir. Might have been a month before. I couldn't tell.

Q. 5. In fact wasn't it a year or so before this accident since you had been in this cut, walking?

A. My best judgment is I had been through that cut within two months previous to this accident, couldn't give the time exactly.

Q. 6. Walking?

A. Yes, sir.

Q. 7. And other times, most of the time you rode through on a train?

A. Various times I would get off the train and examine the tracks. Get off and walk between stations.

Q. 8. When was that?

A. I say; I can't tell, don't remember—don't recall now, don't remember any one particularly.

Q. 9. You don't know that you ever did—Don't you know that it is a fact that you did not?

A. No. I know I walked—I am confident I did.

Q. 10. The next station above that cut is Lockwood, ain't it?

A. There is Savage Branch in there.

Q. 11. That is about four or five miles above this cut?

A. Yes, sir.

121 Q. 12. And the next one this way to the cut would be Hampton City?

A. Yes.

Q. 13. And then you would have to walk seven or eight miles?

A. That is not far I walk that very often.

Q. 14. Is it customary for those who are designated as Engineer of Maintenance of Way to make walks to seven or eight miles between stations?

A. Yes, sir, that is part of his business.

Q. 15. And more often don't they ride in the parlor car or the Pullman car?

A. No, sir.

Q. 16. Did you notice this rock that fell that the witnesses say was loose in the side of the slope?

A. I didn't notice that particular rock, no, sir.

Q. 17. If the rock was sticking out from the slope—the side of the cliff—six or eight inches, from the main body of the cliff, and there had been an erosion by air slacking, and sufficient material had come out from under it until it was projecting over the slope a foot or more, would that indicate to you that there was any danger of it falling?

A. No, sir.

Q. 18. Would not?

A. No.

Q. 19. Is there any condition of a rock in a slope that would indicate to you that it was dangerous?

A. Why, yes, of course there is.

Q. 20. What would that be?

A. If the rock was entirely loose and attached to the slope and was showing signs of settling under the foundation and if the rock had moved and was off of the foundation and was liable to fall from any pressure, put on it—that would indicate the rock
122 was dangerous.

Q. 21. The fact that it projected out over a piece and was loose from the main part of the slope, wouldn't indicate any danger to your *main* at all?

A. No, if the rock was sticking out, it would not be any more likely to fall than a cope stone—Wouldn't fall simply because it projected out a little.

Q. 22. If there was the weight of other rock and stone and stuff on the rock in question and there was gradual erosion under it, say the rock was out—from the cliff six or eight inches, as much as 12 inches, as stated by Mr. Wells would that indicate to you that there was any danger at all?

A. If it was known that dirt and stuff above the rock was loose, and there was any signs of that moving, generally it might be well to look after it.

Q. 23. Suppose that there wasn't none, but a gradual crumbling of the material under the rock that sufficient to put you on notice as to it being dangerous?

A. Wouldn't pay any attention to that?

Q. 24. You would not?

A. No, sir.

Q. 25. You would not pay any attention to the fact that it was out six or eight inches from the slope?

A. Absolutely not.

Q. 26. What would six or eight inches indicate?

A. Just as safe as if it had been stuck back in the hill.

Q. 27. I am speaking about the part that projected?

A. Each particular rock would have to depend on its own condition and surrounding, but as a general rule it would not be dangerous, and no use to pay any attention to it.

123 Q. 28. Suppose the rock in question had slipped from time to time—and changed a little in position would you have noticed that?

A. According to how much it had slipped.

Q. 29. If it had slipped two or three inches you wouldn't have paid any attention to that as Engineer of Maintenance of Way?

A. According to the size of the rock and the general conditions around it?

Q. 30. Suppose that it was on a slope, same character that this slope was, almost perpendicular, as I understand it, if the rock had slipped down hill a few inches would that challenge your attention as being dangerous?

A. If a great big rock, sufficient foundation, had slipped two or three inches wouldn't pay any attention to it.

Q. 31. You say two or three inches, you wouldn't pay any attention to it?

A. You could carry it to a point where it would be dangerous of course.

Q. 32. You don't know where that point is?

A. I would have to consider the ground and the conditions and look at it from that point, I wouldn't like to state it in the Court room on a hypothetical question.

Q. 33. You didn't look at this rock on the ground?

A. No.

Q. 34. And the fact that the rock would slip a few inches wouldn't require your attention?

A. According to the conditions absolutely.

Q. 35. A rock 10 feet long, four or five feet wide, and a foot or a foot and half thick, lying in the side of a slope, the fact that it moves indicates that it is loose, from the rest of the cliff?

124 A. If it moves, have to be loose, of course.

Q. 36. Is a loose rock in a slope of that kind dangerous?

A. Not if it has got foundation enough to keep it from slipping any more.

Q. 37. What would you say about it?

A. I wouldn't take any chances.

Q. 38. What about this one?

A. I didn't notice this particular rock—I would examine it then to see, take no chances, but I didn't examine it.

Q. 39. When you said you take no chances, you mean take no chances but examine them and see?

A. Yes, sir.

Q. 40. And of course not having examined this one, you, of course did nothing

A. No. I didn't, in this particular case.

The witness, JOHN ARTHUR, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where do you live?

A. I live five miles up Sandy road here.

Q. 2. How far did you live from what is known as England Hill cut at the time the derailment took place?

A. Four miles.

Q. 3. Above it?
A. Yes, sir.
Q. 4. In going to and from your home to Catlettsburg, did you pass through that cut.
A. Yes. sir.
125 Q. 5. You remember the occasion of the accident up there at England Hill Cut when Mr. Dwyer was injured and afterwards died?
A. I heard of it.
Q. 6. Prior to that tell the jury how often you passed through that cut in going to and from your home?
A. I would say twice a month.
Q. 7. Would you be walking or on the train?
A. Walked generally, sometimes on a train.
Q. 8. In passing through that cut tell the jury whether or not you observed the rocks in the cut and the rock cliff as you passed through?
A. Yes sir.
Q. 9. Did you at any time see or observe any rock there that looked or seemed to be dangerous or liable to fall?
A. I never noticed anything being dangerous, as I thought dangerous.
Q. 10. Did these rocks lay back in the hill in layers?
A. That was my idea, of the whole formation and they set back in the hill, that is the way I viewed them.

Cross-examination:

Q. 1. You didn't see this loose rock that fell from the hill?
A. No, sir, I might have saw it, never saw it fall.
Q. 2. Never noticed it when it was in the slope there?
A. No, I never did.

126 The foregoing was all of the evidence introduced or offered by both plaintiff and defendant, and at the conclusion of all the testimony the defendant moved the Court to peremptorily instruct the jury to find for it, to which motion the plaintiff objected and the Court upon consideration of said motion and objection overruled said motion and sustained said objection, to which ruling of the Court the defendant excepted.
Thereupon the Court instructed the jury as follows, to-wit:

No. 1.

The Court instructs the jury that it was the duty of the defendant, The Chesapeake & Ohio Railway Company, to exercise ordinary care to furnish or provide the plaintiff's decedent, Richard Dwyer, a reasonably safe place to perform the work he was employed to perform for defendant, taking into consideration the surrounding circumstances and conditions, and the nature and character of the place where the accident occurred, and the nature and character of the decedent's services he was employed to perform for defendant

at the time of the accident. And if the jury shall find and believe from the evidence that at the time and place of the injury to the decedent in question, mentioned and described in the evidence, that a rock in the earth, slate and stone forming the side of the cut on defendant's road at England Hill, was insecure or loose, and reasonably likely to fall on defendant's track, and that by reason thereof the track of defendant at said place was not in a reasonably safe condition for the performance of the work in which decedent was engaged at the time of his injury, taking into consideration the surrounding circumstances and conditions and the nature and character of the place and the work to be performed by decedent for defendant at said place, and that said unsafe condition, if any there was, at said place, was due to the failure on the part of defendant, or its agents and servants in charge of the maintenance and repair of its road bed and track at said place to exercise ordinary care to provide or furnish decedent a reasonably safe place for the performance of his duties as freight engineer, taking into consideration, the surrounding circumstances and conditions and the nature and character of the place where the accident occurred, and that the defendant, or its agents and servants in charge of the maintenance and repair of its road bed and track at the place in question knew, or by the exercise of ordinary care could have known, of said unsafe condition, if any there was, in time to have prevented the accident in question; and if the jury shall further find and believe from the evidence that by reason of said unsafe condition of the side of said cut, if such there was the rock in question fell from the side of said cut upon the track or road bed of the defendant's railroad in said cut, and as a result thereof the train in question, on which the defendant was in charge of one of its engines as engineer, on the occasion in question, collided with said rock, and a portion of said train was derailed, thrown from or caused to leave the track and roadway of defendant, thereby inflicting injuries upon the decedent, Richard Dwyer, of which he subsequently died; and if the jury shall further believe from the evidence that at the time of his decease the decendent had a wife, Sarah Dwyer, who is now living, and that at the time of his decease she was then dependent upon him for support and maintenance, then the law is for plaintiff and the jury should so find, and in that event fix her damages as indicated in instruction No. 4.

127

No. 2.

128 The jury are instructed that the defendant Company is not an insurer of the safety of its employes, and was only bound to exercise ordinary care to provide for the decedent, Richard Dwyer, a reasonably safe place in which to work, taking into consideration the circumstances and conditions and the nature and character of the place and the work to be performed by defendant, and by decedent for it at said place.

And in this case the jury are instructed to find for defendant unless they shall find and believe from the evidence that the acci-

dent to the decedent in question was directly and proximately caused by the negligence of the defendant as indicated in Instruction No. 1, if it was negligent as set out therein.

No. 3.

The jury are instructed that the decedent, Richard Dwyer, in accepting employment as engineer of the defendant Company, and in engaging or continuing in the work as engineer of a freight train on its railroad, assumed the risks or dangers ordinarily incident to the performance of his work as such engineer; and they are further instructed that the happening of the accident in question, from which Richard Dwyer, lost his life, of itself cannot be taken as evidence of the failure of the defendant, or its agents or servants in charge of the maintenance and repair of its road bed and tracks at the cut and place in question, to exercise ordinary care to provide a reasonably safe road bed and track at said place for the operation and passage of its freight trains thereon, but the jury may consider the happening of the derailment of the train on said occasion in connection with the other evidence in the case in determining whether the defendant Company or its agents or servants
129 aforesaid, failed in the performance of its duty as indicated in instruction No. 1, and if they shall believe from the evidence that the accident in question did not happen on account of the failure of defendant, or its agents or servants in charge of the maintenance and repair of the road bed and track at the place in question to exercise ordinary care to provide and maintain a reasonably safe road bed and track at said point for the operation of trains thereon, but from a cause, or causes, other than above stated, then and in that event it was one of the risks or dangers incident to the decedent's work or employment, and for which plaintiff cannot recover, and you will find for defendant should you so believe from the evidence.

No. 4.

The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate prob-
130 able earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer.

No. 5.

The jury are instructed that the term or phrase "Ordinary care" as used and meant in these instructions, is such care or that degree of care which ordinarily prudent persons engaged in like or similar business, occupation or employment are accustomed to exercise under like or similar circumstances to those shown to exist in this case from the proof.

131 And the word "negligence", as used and meant in instruction No. 2 means the failure to exercise ordinary care as defined in this instruction.

No. 6.

Nine of the jury concurring may find and return a verdict in the case; but if found and returned by any less than the entire jury then all the jurors who agree to it must sign their names to their verdict.

If all the jury agree on a verdict then only one of them will sign it as foreman.

To the giving of Instructions Nos. 1, 2, 3, 5, and 6, and each of them, the defendant objected and excepted, and still excepts.

That part of Instruction No. 4, to-wit:

"The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as a result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, Richard Dwyer, and in the event that the jury shall find for the plaintiff, they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Was given on motion of defendant. To the giving of instruction No. 4, except as to the above clause given on their motion, the defendants and each of them objected and excepted and still

132 except.

Thereupon after argument by Counsel for both plaintiff

and defendant, the jury retired to their room, and after awhile returned into Court, the following verdict:

"We the undersigned jurors agree and find for the plaintiff in the sum of $16,000.00, Sixteen Thousand Dollars.

JOE STEWART.
S. H. BRYANT.
ALMON DARBY.
HUGH FAULKNER.
—— ROW.
J. G. RUCKER.
T. R. McGLOTHIN.
WILLIAM CAVERN.
A. T. GILLEY.

Thereupon the Court rendered judgment for the plaintiff upon said verdict.

The defendant thereupon filed its motion and grounds for a new trial herein. Said motion and grounds are in words and figures as follows, to-wit:

Boyd Circuit Court.

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Motion and Grounds for a New Trial.

Comes the defendant, Chesapeake & Ohio Railway Company, and moves the court to set aside the verdict of the jury in this case and the judgment of the Court entered therein and to grant it a
133 new trial thereof, and assigns these its grounds in support of said motion:

First. Because the verdict is contrary to law.

Second. Because the verdict is opposed to the overwhelming weight of the evidence.

Third. Because the amount of the verdict is excessive and so excessive that same appears to have been given under the influence of passion and prejudice.

Fourth. Because of error of the Court in excluding certain competent, relevant and material testimony offered by defendant, to which action of the Court the defendant at the time and in each instance objected and excepted.

Fifth. Because of error of the Court in admitting certain incompetent and irrelevant testimony offered by plaintiff, to which action of the court defendant at the time and in each instance objected and excepted.

Sixth. Because of error of the Court in giving to the jury instructions Numbers 1, 2, 3, 4, 5 and 6, and each of them, and to the

giving of each of said instructions the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING AND
PROCTOR K. MALIN, *Attorneys for Defendant.*

134 And the Court being sufficiently advised overruled said motion and grounds for a new trial, to which ruling of the Court the defendant excepted and prayed an appeal to the Court of Appeals, which was granted, and the defendant was given until and including the 10th day of the next term of this Court to prepare and tender its bill of exceptions herein.

Thereupon comes the defendant and within the time allowed it and presents the foregoing Bill of Exceptions, and it asks that same be signed and approved by the Judge of this Court, and found and certified to be true and to contain all the evidence offered or heard and all the instructions given, or offered or refused, all of which is accordingly done, found and certified, and the same is ordered to be made a part of the record herein without being spread on the order book herein.

W. C. HALBERT,
Judge Boyd Circuit Court.

135 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in the City of Frankfort on January 29, 1915, the following judgments and orders were entered, towit:

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from Boyd Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant her costs herein expended.

At the same time, to-wit, January 29, 1915, said Court of Appeals delivered an opinion, which is in words and figures following towit:

136 Court of Appeals of Kentucky, January 29, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from Boyd Circuit Court.

Opinion of the Court by Judge Settle, Affirming.

This is the second appeal in this case, the opinion upon the former appeal being reported in 157 Ky. 590. As the facts out of which the action arose and questions of law involved, are fully set out in that opinion, it is unnecessary to repeat them here; it being sufficient to say that appellee's intestate, Richard Dwyer, who was a locomotive engineer in the employ of the appellant, Chesapeake & Ohio Railway Company, was killed May 12, 1910, at England Hill in Boyd County, by the derailment of a part of a freight train upon which he was employed as such engineer; it being alleged in the petition that the intestate's death was caused by the negligence of appellant in the particulars therein named, but, mainly, on account of its negligence and that of its servants, in failing to take the proper precautions to prevent the fall of debris upon the railroad
137 track resulting from a landslide at the place of the accident, which caused the derailment of the train. The action was brought under the act of Congress known as the "Employers' Liability Act," approved April 22, 1908, as amended by the act of April 5, 1910.

The first trial resulted in a verdict and judgment in appellee's favor for $14,000.00 damages. On the second trial occurring after the reversal of that judgment by this court, appellee recovered a verdict for $16,000.00 damages, and this appeal is prosecuted from the judgment entered upon that verdict.

It is not denied by counsel for appellant that the evidence authorized a recovery of damages for some amount, but insisted that the amount recovered on the last trial is grossly excessive, and that the trial court erred in instructing the jury as to the measure of damages. It is admitted that the deceased left but two children, a son and daughter, the former being an adult and the latter a married woman, and that neither of the children was dependent upon him for a support. So in determining whether or not the verdict is excessive only the damage sustained by the appellee widow can be considered.

It appears from the evidence that the deceased, Richard Dwyer, was a sober, industrious man, in good health and forty-five years of age, at the time of his death; and that he was earning $150.00 per month regularly, and often would receive from ten to twenty dollars per month, in addition, for extra time, which made his
138 monthly earnings vary from $150.00 to $170.00. According to the table introduced in evidence, the deceased at the time

of his death had an expectancy of 24.46 years. So, taking the $150.00 per month as a basis, he was earning $1,800.00 per year, which, if continued through the period of the expectancy, would have aggregated $44.028. If we accept $160.00 per month as a basis, which will probably be a fair average, his earnings would have amounted to $1,920.00 per year, and, during the years of the expectancy, reached $46,963.20. If we take $150.00 per month as his earnings during the period of expectancy, amounting altogether to $44,028.00, and it be assumed that only one-half thereof, $22,014.00, would have been required to support the wife had he lived, such half would exceed $6,014.00 the amount awarded by the verdict of the jury. If, however, we accept as a basis $160.00 per month, which, according to the proof would be a fair average, it would amount during the period of expectancy to $46,963.20, one-half of which, $23,481.60, would exceed by $8,481.60 the amount awarded by the verdict of the jury. If only one-third of his earnings would have been required for the support of the widow had he lived, taking $160.00 per month as a basis for what he would have earned during his life expectancy, such third, amounting to $15,654.40, would be only $345.60 less than the amount recovered. Under the award made by the jury the appellee, widow of the deceased, will only receive $654.13 each year of the 24.46 years of expectancy, which is doubtless less than she would have received had her husband lived during that time, even if allowance be
139 made for a reasonable diminution in the deceased's ability to earn money, that might be expected to result from the decline of strength during the latter years of such expectancy.

The contention of counsel for appellant, that the verdict of $16,000.00, if placed on interest at six per cent, would yield an annual income greater than the amount that the decedent's widow would have received had he lived and yet leave her the principal to dispose of at the time of her death, was declared in the case of C. & O. Ry. co. v. Kelly's Adm'x. 160 Ky., 296, to be without merit. In the opinion it is said:

"Appellant insists, under the principles of Gulf & Colorado Railway Co. v. McGinnis, 228 U. S. 173, and Mich. Cent. Co. v. Vreeland, 227 U. S. 59, that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded ought to be such that if placed at interest, would be wholly consumed when the time of dependency ceases, and that the jury should been so instructed. In the McGinnis case, supra, the court construes the Employers' Liability Act to provide compensation to cer-
140 tain surviving relatives of the employe, 'for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given.' With reference to the apportionment of the benefit of each, the jury must do this, 'measured by his or her individual pecuniary loss.' We are unable to see that the McGinnis case, supra, either in principle or by intimation, requires that the measure of damage in the instruction to juries should

be any different from the one in this case. In fact, the instructions, as above quoted seem to have been drawn to conform to the principles announced in the McGinnis case. The instructions limited recovery to the actual 'pecuniary loss.' Their whole loss was sustained at the time of his death. There is no more reason in appellant's theory, that the defendants should have discounted the loss, than there is that the Railroad Company should be adjudged to pay a fixed sum annually, semi-annually or monthly for their support. The award of the jury should be for the pecuniary loss suffered. While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary. We
141 believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case."

The age of the appellee widow at the time of her husband's death was forty-three, two years younger than the husband, consequently, her expectancy of life was practically the same as his; and the criterion of recovery being only the actual pecuniary loss resulting to the widow from the death of the husband, as the amount recovered is less than one-half of what the gross earnings of the decedent would have been during the probable duration of his life and not more than the widow would probably have received out of such earnings for her support, had he lived, there is, in our opinion, no ground for appellant's contention that the verdict is excessive.

Appellant's complaint of the instruction as to the measure of damages is without merit. The law as given by the court on this feature of the case is found in instruction No. 4, which is as follows:

"The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the
142 said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, or other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition. And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of

her dependency, if any, as the widow of decedent and, in no event, for a longer period than her said husband would have probably lived but for the injury complained of and in question. The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

The measure of damages as given in the above instruction is substantially the same as that contained in the instruction given in the case of C. & O. Ry. Co. v. Kelly's Adm'x, supra, which received our approval in that case. It will be observed that the instruction
143 did not, as claimed by appellant's counsel, require the jury to find for the decedent's administratrix the aggregate sum of his earning capacity during the life expectancy, but limited the recovery, so that it could not exceed the actual pecuniary loss which the widow sustained by the decedent's death, or in any event exceed the amount claimed in the petition, $40,000.00, which is, itself, less than the evidence showed the decedent's earning capacity would have been during such expectancy.

The record furnishing no reason for the reversal asked, the judgment is affirmed.

Proctor K. Malin, Ashland, Ky.; Worthington, Cochran & Browning, Maysville, Ky., for appellant.

R. S. Dinkle, Catlettsburg, Ky.; Watt M. Prichard, Catlettsburg, Ky.; Geo. B. Martin, Catlettsburg, Ky., for appellee.

[Endorsed:] Jan. 29, 1915. C. & O. v. Dwyer.

144 Afterwards, to-wit, on the 26th of February, the appellant filed its Petition for Rehearing herein in words and figures following, to-wit:

145 Court of Appeals of Kentucky.

THE CHEAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Appeal from Boyd Circuit Court.

Petition for Rehearing.

May it Please the Court:

The opinion rendered herein, to which this petition for
146 rehearing is directed, is reported in 162 Ky. 427.

The grounds for rehearing are as follows:

By reason of the provisions of the Seventh Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

It will be borne in mind that this action is one arising under the Federal Employers' Liability Act (35 Statutes at Large 65); that the right asserted in it is one created by and dependent solely upon that Act, the Federal legislation upon the subject of injuries to employes of carriers engaged in interstate commerce having superseded all other. There is no right on account of personal injury which such an employe has against such an employer other than is provided by the Act, nor can any right thereby created be enforced in any other manner than that herein prescribed.

By the sixth section of the Act as amended by the Act of April 5, 1910, (36 Statutes at Large, 291,) it is provided that:

"The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states."

The Seventh Amendment to the Federal Constitution provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-
147 served, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It will, of course, be recognized at once that this Amendment consists of two independent clauses, the first providing for the preservation of the right of trial by jury in all suits at common law where the value in controversy exceeds twenty dollars, and the second providing that after a jury shall have passed upon a question of fact, it shall not be otherwise re-examined in any court of the United States than according to the rules of the common law. It is the first of these clauses with which we have to do here.

The right of trial by jury, which this Amendment declares "shall be preserved," is the right to a trial by a jury of twelve men, whose finding shall be unanimous:

American Publishing Co. v. Fisher, 166 U. S. 464, 41 L. Ed. 1079.

In Springville City v. Thomas, 166 U. S. 707, 41 L. Ed. 1173, the Supreme Court, speaking through Mr. Justice Fuller, said:

"In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases; and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

In Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 41 L. Ed. 841, Justice Brewer, speaking for the court, said:

"The Seventh Amendment, indeed, does not attempt to
148 regulate matters of pleading or practice. * * * Its aim is not to preserve mere matters of form and procedure, but substance of right."

In the Fisher case, supra, the same Justice again, speaking for the court, said (166 U. S. 468, 41 L. Ed. 1081:)

"Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

We therefore submit that "the right of trial by jury" (that is, a trial by a jury of twelve, whose verdict shall be unanimous,) which the Seventh Amendment declares "shall be preserved," necessarily inheres in every cause of action created by or originating under an Act of Congress; and that the Congress cannot confer upon any court, nor can any court otherwise obtain jurisdiction to try such causes of action, unless it be so constituted as to afford the trial required by the Seventh Amendment.

Now the Constitution of Kentucky, Section 248, provides that:

"The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel;"

and Section 2268, Kentucky Statutes, which carried into effect the above constitutional provision, provides that,

"In all trials of civil actions in the circuit courts, three-
149 fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Neither Section 248, of the Constitution of Kentucky, nor the above legislation passed in pursuance thereof, are forbidden by the first clause of the Seventh Amendment to the Federal Constitution, which is a limitation upon the power of Congress and not a limitation upon the legislative power of the state, and the state legislation upon this subject being entirely valid as to procedure in its courts, it is clear that no circuit court in Kentucky can enforce the common-law requirement as to a unanimous verdict by twelve men, or can refuse to receive a verdict rendered by nine, which is not amenable to some other legal objection.

Now in all cases where the Congress can confer concurrent jurisdiction upon state and Federal courts, it can, if it see fit, confer the jurisdiction exclusively upon the state courts. The right of trial by jury, however, as that term is used in the Seventh Amendment, is one which Congress may not take away or even abridge; but if it could create rights and liabilities and commit their enforcement exclusively to courts powerless to enforce the constitutional mandate as to mode of trial, then a right secured to a litigant by the Federal Constitution would be held at the mere will of the Federal legislation; a conclusion which, of course, is absurd.

It would seem, therefore, to follow that the courts of a state which are powerless to satisfy the requirements of the Seventh Amendment cannot entertain jurisdiction of a cause of action created by, and

wholly dependent upon, an Act of Congress; they cannot
150 acquire jurisdiction of the "subject matter of the action."

Indeed, it is fairly questionable whether it was intended by Congress to confer jurisdiction upon such courts. The Amendment to Section 6 of the Employers' Liability Act is as follows (italics ours:)

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no cases arising under this Act and brought in any state court of *competent* jurisdiction shall be removed to any court of the United States."

And in Section 28 of the Act of March 3, 1911, known as the Judicial Code, it is again provided that no case arising under the Employers' Liability Act

"brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This language in both statutes seems to imply a purpose to confine the jurisdiction, as to the state courts, to those of "competent jurisdiction" only; and, as we have seen, no court can be said to be "competent" for the adjudication of a purely Federal right or liability which is not equipped with the power to afford the kind of trial required by the Federal Constitution.

The argument may be thus concisely summarized: The Seventh Amendment provides for the preservation of the right of trial in
common-law cases by the unanimous verdict of a jury of
151 twelve; this is not a mere matter of procedure or form, but, as declared by the Supreme Court in Walker v. N. M. & S. P. R. Co., supra, one of "substance of right;" while this is not a limitation upon the power of the states, it is a limitation upon the power of the Federal Government to provide any other mode of trial for such cases; if Congress can create rights and impose liabilities, which, by reason of their nature must be enforced by "suits at common law," and provide for their adjudication otherwise than by "trial by jury," it can set aside at pleasure the constitutional requirement, which is absurd; and if it undertakes to commit the adjudication of such rights and liabilities to tribunals which are organically incapable of affording such a jury trial, such undertaking does involve an attempt to provide another mode of trial than that required by the Federal Constitution. The court, therefore, should not, unless compelled by necessary principles of statutory construction, interpret the Congressional legislation in question as intending to commit to those state courts, which are unable to satisfy the requirements of the Seventh Amendment, the adjudication of the rights created, and the liabilities imposed, by it; but if it be necessary to construe it as evidencing such purpose, the legislation should, in that particular, be declared unconstitutional and void.

We deem it unnecessary to argue the proposition that this question of jurisdiction of the subject-matter is one that cannot be waived, but, until the final disposition of the cause, may at any time be raised by the parties and should be raised by the court itself whenever presented to its notice. See:

Ormsby v. Lynch, Litt. Sel. Cases, 307.

152 Lindsey v. McClelland, 1 Bibb 263.

Fidler v. Hall, 2 Met. 461, 463.

Davidson v. Johnson, 113 Ky. 210.

Mansfield C. & L. M. R'y v. Swan, 111 U. S. 379, 382, 28 L. Ed. 462, 464.

Metcalf v. City of Watertown, 128 U. S. 586, 587, 32 L. Ed. 543.

We ask that a rehearing be granted; that the judgment appealed from be reversed, and, as was done in Fidler v. Hall, supra, that the cause be remanded with a direction to the Boyd Circuit Court to dismiss the action.

Respectfully submitted,

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Appellant.

153 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky on March 26, 1915, the following order was entered, to-wit:

C. & O. Ry. Co.
vs.
Dwyer's Adm'x.

Boyd.

The court being sufficiently advised ordered that the petition for rehearing herein be and the same is now overruled.

On the same day, to-wit, March 26, 1915, the following Mandate was issued on the judgment of affirmance herein:

The Commonwealth of Kentucky:

The Court of Appeals, January 29, 1915.

Chesapeake & Ohio Railway Company, Appellant,
against
Richard Dwyer's Administratrix, Appellee.

Appeal from a Judgment of the Boyd Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein.

Which is ordered to be certified to said Court.

ROBT. L. GREENE, C. C. A.,
By A. ADDAMS, *D. C.*

154 Afterwards on the 5th day of April, 1915, the appellant and plaintiff in error filed in the Clerk's office of the said Court of Appeals its Petition for Writ of Error, which is in words and figures, following, to-wit:

155 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Petition for Writ of Error.

The petitioner, The Chesapeake and Ohio Railway Company, appellant herein, hereby sets forth that on or about the 29th day of January, 1915, the Court of Appeals of the State of Kentucky made and entered an order and judgment herein in favor of the appellee, Sarah Dwyer, as administratrix of the estate of Richard Dwyer, deceased, and against said petitioner, the appellant; that afterwards, and within the time allowed by the law of the State of Kentucky, appellant filed a petition for a rehearing in said cause, and thereby, and under the laws of the State of Kentucky and the rules of said court, the said order and judgment was suspended and did not become final until the Court of Appeals acted upon said petition for a rehearing; that afterwards, on the 26th day of March, 1915, the said petition for a rehearing was overruled by the said Court of Appeals, and its said judgment and order, made, as aforesaid, on or about the 29th day of January, 1915, became final and the mandate of said Court of Appeals was, upon said day, duly issued thereon; that in said order and judgment and the proceedings had
156 prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition:

That the said Court of Appeals of the State of Kentucky is the highest court of the said State of Kentucky in which a decision in this suit and this matter could be had.

Wherefore said petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of, and that a transcript of the record, pro-

ceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 1st day of April, 1915.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Attorneys for said Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 5th day of April, A. D. 1915; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of twenty-five ($25,000.00) thousand Dollars.

Dated at Frankfort, Kentucky, this 5th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

157 On the same day, to-wit April 5, 1915, the plaintiff in error filed in said Clerk's office its Writ of Error, which is in words and figures following, to-wit:

158 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Chesapeake and Ohio Railway Company, Appellant, and Sarah Dwyer, as Administratrix of the estate of Richard Dwyer, deceased, Appellee, wherein was drawn into question the validity of a statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said statute, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of The Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme

159 Court of the United States, together with this writ, so that you have the same at Washington, thirty days after the date

hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States, for the Eastern District of Kentucky, at Frankfort, this the 5th day of April, 1915.

[Seal United States of America, Eastern K't'y Dist. Court.]

JNO. W. MENZIES,
Clerk of the United States District Court
for the Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by:
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

160 At the same time, to-wit, April 5th, 1915, said plaintiff in error filed in said Clerk's office its Assignment of Errors in words and figures following, to-wit:

Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, as Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Assignment of Errors.

Now comes the said appellant, the plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, in the above entitled cause, there is manifest error in this, to-wit:

First. The said court erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the 7th Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky, to grant a jury trial by an unanimous jury of twelve, the Boyd Circuit Court

was not a court of competent jurisdiction with- the provisions of the Federal Employers' Liability Act, and Section 28 of the Act
161 of Congress of March 3, 1911, known as the Judicial Code.

Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury instruction No. 4, which was in words and figures as follows:

"The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of
162 the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(*a*) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business abiliy, earning capacity, and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage.

(*b*) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advan-

tage as being equal to the probable earnings of said decedent during the whole period of his life expectancy.

(*c*) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(*d*) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(*e*) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

163 Wherefore, the said appellant, plaintiff in error, prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky, and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Court of Appeals of the State of Kentucky, and order and direct that the said cause be remanded to the Boyd Circuit Court of said state of Kentucky with directions to dismiss said action, and to grant to the plaintiff in error all such other relief as may be proper.

Dated this 5th day of April, 1915.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Plaintiff in Error.

164 At the same time said plaintiff in error filed in said Clerk's office its Writ of Error Bond, which is in words and figures, to-wit:

165 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Bond.

Know All Men by These Presents:

That we, The Chesapeake & Ohio Railway Company, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Sarah Dwyer, as administratrix of the estate of Richard Dwyer, deceased, in the sum of Twenty Five Thousand Dollars, to be paid to the said obligee, her successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

In testimony whereof we have hereunto subscribed our names this 5th day of April, A. D. 1915.

Whereas, the above named The Chesapeake & Ohio Railway Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the state of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damage, if it shall fail to make good its plea, then this obligation shall be void, but otherwise to remain in full force and effect.

166 THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By W. D. COCHRAN, *Attorney.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By C. W. HAY, *Attorney in Fact.* [SEAL.]

STATE OF KENTUCKY,
County of Franklin, sct:

I, W. S. Sandifer, a Notary Public within and for the above named county and state, certify that on this day and in said county and state, the foregoing instrument was produced to me, and was acknowledged by W. D. Cochran, attorney of the above named The Chesapeake & Ohio Railway Company, for and on behalf of said Railway Company, to be its act and deed.

Given under my hand and seal this 5th day of April 1915. My commission expires — day of ——, 19—.

[SEAL.] W. S. SANDIFER,
Notary Public.

Notary Public of Franklin Co., Ky.
My commission expires at the end of the next Session of the Senate.

STATE OF KENTUCKY,
County of Franklin, sct:

I, W. S. Sandifer, a Notary Public within and for the above named county and state, certify that on this day and in said county and state, the foregoing instrument was produced to me, and was acknowledged by C. W. Hay, attorney in fact of the above named United States Fidelity & Guaranty Company, for and on behalf of said United States Fidelity & Guaranty Company, to be its act and deed.

167 Given under my hand and seal this 5th day of April, 1915. My commission expires — day of ——, 19—.

[SEAL.] W. S. SANDIFER,
Notary Public.

Notary Public of Franklin Co., Ky.
My commission expires at the end of the next Session of the Senate.

I hereby approve the foregoing bond and surety, this 3rd day of April, A. D., 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

168 Afterwards, to-wit, on the 8th day of April, 1915, said plaintiff in error filed the Citation with service endorsed thereon, which Citation is in words and figures following, to-wit:

169 UNITED STATES OF AMERICA, *ss:*

To Sarah Dwyer, as administratrix of Richard Dwyer, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the state of Kentucky, wherein The Chesapeake and Ohio Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of Kentucky, this 5th day of April, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky,
By T. M. JONES, *D. C.*

Copy of the above citation received, and service of said citation hereby acknowledged this 6" day of April, A. D. 1915.

R. S. DINKLE,
WATT M. PRICHARD,
GEO. B. MARTIN,
Attorneys for Defendant in Error.

Also at the same time received copy of writ of error and bond.

R. S. DINKLE,
WATT M. PRICHARD,
GEO. B. MARTIN.
Attorneys for Defendant in Error.

170 At the same time, to-wit, April 8, 1915, said plaintiff in error filed its Praecipe, which is in words and figures following, to-wit:

171 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Præcipe of Appellant (Plaintiff in Error).

In conformity of Rule Eight of the rules of the Supreme Court of the United States, and in order for the preparation of the transcript of the record upon the writ of error from said Supreme Court to the Court of Appeals of Kentucky, the above named The Chesapeake & Ohio Railway Company, appellant in said Court of Appeals, indicates the following as the portion of the record in this action to be incorporated into the transcript of the record on said writ of error, to-wit:

1st. The preamble on page 3 of the record on the first appeal.

2nd. The plaintiff's petition, on pages 3 to 7 of the record on the first appeal.

3rd. The answer of defendant, and order noting same, on pages 13 to 17 of the record on the first appeal.

4th. The reply of plaintiff, and the order noting same on pages 17 to 19 of the record on the first appeal.

5th. Order of March 19, 1913, noting the commencement of the trial and empanelling of the jury, on page 19 of the record on the first appeal.

172 6th. The judgment of the Boyd Circuit Court, rendered on the 20th. day of March, 1913, on page 20 of the record on the first appeal.

7th. The order of March 21, 1913, noting motion and grounds for a new trial, the order overruling the motion and grounds for a new trial, and granting an appeal to the Court of Appeals, and extending time for filing of bill of exceptions, on page 21 of the record on first appeal.

8th. The motion and grounds for new trial, on pages 21 and 22 of the record on the first appeal.

9th. The order noting filing of bill of exceptions, on pages 22 to 23 of the record on first appeal.

10th. The judgment of the Court of Appeals of Kentucky, reversing the judgment of the Boyd Circuit Court, on the first appeal herein, and opinion of the court of Appeals of Kentucky rendered on said first appeal, and the mandate of the Court of Appeals of Kentucky issued upon the judgment entered on said first appeal.

11th. The amended petition of plaintiff, filed on the 23rd. day of June, 1914, and the order noting the filing of same, on pages 25 to 27 of the record on the second appeal.

12th. The order of June 24th., 1914, noting the filing of the mandate of the Court of Appeals, on page 28 of the record on the second appeal.

13th. The order of June 24th., 1914, traversing the plaintiff's amended petition, on page 30 of the record on the second appeal.

14th. The order of June 24, 1914, noting the commencement of the trial and empannelling of the jury, on page 30.

173 15th. The order and judgment of date June 25, 1914, on pages 31 to 32 of the record on the second appeal.

16th. The order of June 26, 1915 noting the motion and grounds for new trial, and said motion and grounds for new trial, on pages 32 to 33 of the record on the second appeal.

17th. The order of July 3, 1914, overruling the motion and grounds for a new trial, and granting an appeal to the Court of Appeals, on pages 34 to 35 of the record on the second appeal.

18th. The order of July 3, 1914, extending time for filing of bill of exceptions, on page 35 of the record on second appeal.

19th. The order of September 11, 1914, extending time for filing of bill of exceptions, on page 36 of the record on second appeal.

20th. The order filing and approving the bill of exceptions, on page 37 of the record on the second appeal.

21st. The defendant's bill of exceptions, on pages 39 to 157 of the record on the second appeal.

22nd. The judgment of affirmance and opinion of the Court of Appeals of Kentucky, on the second appeal of this cause.

23rd. The petition for rehearing filed by Appellant on the second appeal of this cause, and the response or order overruling petition for rehearing delivered by the Court of Appeals, and the mandate of the said Court of Appeals, upon the second appeal of this case.

24th. The petition for writ of error, the writ of error, and allowance of same, the assignment of errors, the writ of error bond, the citation and return of service of same, this præcipe, and

174 the return of service of same.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Above-named Appellant, Plaintiff in Error.

Copy of the above præcipe received, and service of same hereby accepted and acknowledged, this 6th. day of April, 1915.

R. S. DINKLE,
MATT M. PRICHARD,
GEO. B. MARTIN,
Attorneys for Defendant in Error.

175 Afterwards, to-wit, on the 13th day of April, 1915, said defendant in error filed its Præcipe, which is in words and figures following, to-wit:

176 Court of Appeals of Kentucky.

CHEASAPEAKE & OHIO RAILWAY COMPANY, Appellants,
against
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Præcipe of Appellee (Defendant in Error).

In pursuance of Rule Eight (8) of the rules of the Supreme Court of the United States, the above named Sarah Dwyer as Administratrix of the estate of Richard Dwyer, deceased, appellee in said Court of Appeals, indicates the following additional portions of the record to be incorporated into the transcript of the record on the writ of error herein, to-wit:

First. The brief of the appellant, Chesapeake & Ohio Railway Company, on the first appeal herein.

Second. The brief of the appellant, Chesapeake & Ohio Railway Company, on the second appeal herein.

Third. This præcipe and the acknowledgment of service thereof.

R. S. DINKLE,
MATT M. PRICHARD,
GEO. B. MARTIN,
Counsel for Above-named Appellee (Defendant in Error).

Service of copy of above præcipe acknowledged and accepted. This April 8th, 1915.

PROCTOR K. MALIN,
Counsel for Appellant (Plaintiff in Error).

177 Court of Appeals of Kentucky.

No. 278.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Brief for Appellant.

Statement.

May it Please the Court: On the 12th day of May, 1910, the appellee's intestate, an engineer in the employment of the appellant, was killed as the result of the derailment of a part of the train upon which he was at the time employed. The scene of the accident was at England Hill, in Boyd County, Kentucky, upon the Big Sandy division of appellant's railroad. The train in question was a freight,

and, at the time of the accident, was being hauled by two engines; the decedent was the engineer upon the second engine.

178 At the place where the accident occurred, the railroad tracks are located in a cut, the sides or banks of which are several feet in height. The cause of the accident was a landslide, or rather slip, upon the side of the cut, which caused rock and earth to be deposited upon the track. When decedent's train struck this deposit of dirt and rock, the two engines were derailed, and decedent received injuries which shortly afterwards resulted in his death.

The derailment occurred at about 1:30 on the morning of May 12, 1910. Presumably the dirt and rock fell upon the track within a few hours of the accident, as a section crew passed over this portion of the track late in the preceding afternoon and saw no indications of any trouble. The decedent, being in the second engine, apparently did not know of the presence of the debris upon the track until about the time of the derailment. The engineer upon the leading engine did not discover the danger until it was too late to stop the train. It was raining at the time of the accident and had been for some time prior thereto.

This action was instituted by the appellee as administratrix of the estate of the decedent, and a recovery sought under the Employers' Liability Act of Congress, approved April 22, 1908, as amended by the act of April 5, 1910, the petition alleging the facts necessary to bring the suit within the purview of the federal act. The following grounds of negligence were relied upon in the petition, first, negligence of the employes in charge of the train; second, failure of the appellant (defendant) to equip the engines with sufficient headlights; and third, negligence of the appellant in failing to take the proper precautions to prevent the fall of debris upon the railroad track at the place in question. Upon the trial of

179 the case, the first two grounds of alleged negligence were abandoned, appellee relying only upon the third ground. In support of the allegations of negligence in this latter respect, testimony was introduced which tended to show that for sometime prior to the accident, the side of the cut had been in a more or less dangerous condition because of the presence of overhanging rocks and loose dirt. Appellant's testimony was to the effect that the side of the cut gave no indication of danger, or of the probability of a slide, and that the accident could not have been anticipated or prevented.

Upon the trial of the case a verdict was returned in favor of appellee for the sum of $14,000.00, and judgment was rendered accordingly. Motion and Grounds for a new trial having been filed and overruled, this appeal was prayed.

I.

Argument.

Upon the question as to the measure of damages the trial court gave to the jury the following instruction (see page 119, record):

"The jury are instructed that if they should find for the plaintiff, then they will from the evidence find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate the estate of the decedent, Richard Dwyer, for the destruction of his power to earn money, caused by his death, not exceeding, however, the sum of $40,000.00, the amount claimed in the petition."

The above instruction, while stating the measure of damages applicable to actions brought under the Kentucky death statute (section 6, Ky. Stats.) is not applicable to suits brought under the Employers' Liability Act of Congress. In actions for death instituted under this latter act, the damages authorized to be
180 awarded are not to compensate the estate of the deceased employe for the destruction of his power to earn money, but only to compensate the surviving relatives of the deceased for the actual pecuniary loss resulting to the particular person, or persons, for whose benefit the statutory right of action is given. The character of the liability imposed by the act of Congress, and the measure of recovery thereunder, has been definitely and decisively settled by a number of recent decisions of the Supreme Court of the United States.

The question here presented was first discussed and settled by the Supreme Court in the case of Michigan Central Railroad Company v. Vreeland, 227 U. S. 59, 57 L. Ed. (decided Jan. 20, 1913), which was an action brought under the federal act for the benefit of the widow of an employe who was killed while engaged in interstate commerce. In the course of an exhaustive opinion by Mr. Justice Lurton, it is said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss or damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds—'or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death', etc." * * *

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by

relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only."

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. chap. 93, known as Lord Campbell's act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the
181 courts of the states and of England, has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death." * * *

"The word, 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

"A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of that loss to the beneficial plaintiffs, which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' Patterson, Railway Acci. Law, Sec. 401."

It will thus be seen that it was definitely settled by the above decision, that in an action under the statute for the death of an employe, the measure of recovery was the pecuniary loss resulting to certain dependent members of the family of the decedent, and that only.

So, in the case of American Railroad Company of Porto Rico v. Didrickson, 227 U. S., 145, 57 L. Ed. , (decided January 27, 1913), in the course of the opinion, also by Mr. Justice Lurton, it is said:

"There was error in the rule for measuring the damages recoverable.

"The cause of action which was created in behalf of the injured employe did not survive his deatth, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained."

182 Still more recently in the case of Gulf, Colorado & Santa Fe Railway Company v. McGinnis, 228 U. S., 173, 57 L. Ed. — (decided April 7, 1913), which, like the case at bar, was an

action instituted by the widow as administratrix for the benefit of the widow and children the court said:

"In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss." * * *

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

See, also, St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly, 228 U. S., 702, 57 L. Ed., (decided May 26, 1913).

Furthermore, this exact question was met and decided by this court in the case of Illinois Central Railroad v. Doherty's Adm'r, 153 Ky., 363, wherein it was said:

"It is clear that the act does not like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It, therefore, expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz: the beneficiaries named, in the order named. This being so, it necessarily follows, that in an action under the act of Congress if there is no one for whom a recovery can be had, there can be no recovery. Proof must, therefore, be made of the existence of such surviving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So, if the petition in such an action fails to allege that the decedent is survived by a person or persons coming within the indicated limitation, it is bad on demurrer."

183 It will be seen from the above quoted excerpt from the opinion of Judge Settle, that this court has expressly held that in actions brought under the federal act, the recovery is not "to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money."

And this is necessarily so, for, "the damage to the estate, and the measure of recovery therefor, are essentially different from the pecuniary loss or injury to the dependent relatives because of the death of the employe, and the measure of recovery therefor." See Thomas v. Chicago, etc. Ry. Co., 202 Fed. 766.

That the distribution of the damages recoverable under the federal act for the death of an employe while engaged in interstate commerce, is governed by the provisions of that act, and that

act alone, is no longer an open question. In the field covered by the terms of the act of Congress, that act is supreme and supersedes all state legislation. See Illinois Cent. R. Co. v. Doherty, supra; Michigan Cent. R. Co. v. Vreeland, supra; Missouri, K. & T. R. Co. v. Wulf, 226 U. S., 570, 57 L. Ed.—; Second Employers' Liability Cases, 223 U. S., 1, 56 L. Ed. 327.

We submit that the instruction in question was clearly erroneous, and that for this reason, the judgment of the Boyd circuit court should be reversed and the cause remanded.

——— ———,
Counsel for Appellant.

184 *Authorities Cited.*

Michigan Cent. Railroad Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. —, (decided Jan. 20, 1913).
American Railroad Co. of Porto Rico v. Didrickson, 227 U. S. 57 L. Ed. —, (decided Jan. 27, 1913).
Gulf, Colorado & Sante Fe Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. —, (decided April 7, 1913).
St. Louis &c. Ry. Co. v. Hesterly, 228 U. S., 702, 57 L. Ed. —, (decided May 26, 1913).
Illinois Cent. R. Co. v. Doherty's Adm'r, 153 Ky. 363.
Thomas v. Chicago &c. Ry. Co., 202 Fed. 766.
Illinois Cent. R. Co. v. Doherty, supra.
Michigan Cent. R. Co. v. Vreeland, Supra.
Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. Ed. —.
Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed., 327.

185 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Brief for Appellant.

May it please the Court:

This is the second appeal of this case, the opinion upon the former appeal being reported in 157 Ky. 590, 163 S. W. 752, wherein the facts of the case as developed by the proof are so fully stated as to make any restatement herein unnecessary.

The case having been redocketed in the Boyd Circuit Court, upon the second trial of the same, a verdict signed by nine of the jurors, was returned in favor of the appellee (plaintiff) judgment being rendered accordingly, and from that judgment this appeal is now prayed. The grounds relied upon for reversal are as follows:

I.

The Verdict is Grossly Excessive.

As appears from the amended petition filed after the redocketing of the case in the lower court, and from the proof introduced, the only beneficiary herein is the widow of the decedent, who is also the administratrix of his estate and the plaintiff in this action.

In as much as the action is brought under the Federal Em-
186 ployers' Liability Act, and as the widow is the only beneficiary, it follows that any recovery must be confined to the pecuniary loss sustained by the widow as the result of the death of the decedent. In other words, the measure of damages is not the loss to decedent's estate as the result of his death, but the pecuniary loss or damage sustained by appellee herself. See opinion on former appeal and cases therein cited,—and in particular Ill. Cent. R. Co. v. Doherty's Adm'r 153 Ky., 363, 155 S. W. 1119, and Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417.

In determining whether or not the verdict herein is excessive we can consider only the damage sustained by the appellee herself, and not the damage sustained by the decedent's estate.

It appears from the testimony of Mrs. Dwyer that her husband, at the time of his death was 45 years of age, was an engineer in appellant's service, and was making about $160.00 per month. The decedent had in the course of his life accumulated between $600.00 and $700.00, which was invested in a home in Ashland. Appellee and her husband had two children,—a boy and a girl,—the former being self-supporting at the time of his father's death, and the latter being married, neither being a dependent, as has been above stated. The appellee herself was 43 years of age at the time of her husband's death.

We submit that any reasonable method of calculation will show that under the above facts and circumstances the verdict is grossly excessive and far greater than any pecuniary loss that appellee could possibly have sustained.

As we have seen the decedent, though 45 years old at the time of his death, had accumulated only $600.00 or $700.00. It is not reasonable to presume that his accumulations during the
187 remainder would be much greater. Moreover, it is almost a certainty that his earning capacity would, in a few years, have been materially decreased. We particularly call attention to these facts for they, of necessity, have a bearing upon the question of the loss sustained by appellee.

Now, even if it should be assumed that the decedent's earning capacity, as it was at the time of his death, would have continued unimpaired, and that he would have lived out his expectancy of approximately twenty-four years, yet the verdict is in excess of any loss that could in reason have been sustained by appellee. His earnings at his death were about $1,900.00 per year. If we deduct his personal expenses and expenditures therefrom, it is not likely that Mrs. Dwyer would have received more than half of his earn-

ings, or $950.00 per year. Yet the amount of the verdict, to-wit, $16,000.00, will at 6% interest, yield that much of an income annually, and yet leave her the principal unimpaired to dispose of at the time of her death. In other words, in order to reach the conclusion that the verdict is reasonable, we must assume that decedent would have continued earning as much as he was for the rest of his natural expectancy, that his wife would have received half of his earnings, and that, in addition, he would have accumulated a sufficient amount to have enabled her to have received $16,000.00 at his death. But all the above assumptions are beyond the range of probabilities. In the first place, in view of the fact that decedent up to the time of his death had been able to accumulate only six or seven hundred dollars, it would be absurd to assume that he might thereafter have accumulated sixten thousand dollars,
188 or anything approximating that sum. It would be equally absurd to assume that his earning capacity would have continued unimpaired throughout the remainder of his natural life expectancy. There is no reasonable argument upon which can be based the proposition that Mrs. Dwyer's pecuniary loss amounted to $16,000.00. Moreover, even if we assume that Mrs. Dwyer would have continued to receive each year for the rest of her husband's expectancy, one half of what he was making at the time of his death, yet the present cash value of what she would thus have received would have been less than $14,000.00. And if we take into consideration the certainty that the decedent's earning capacity would soon have been materially lessened because of his increasing age, then the verdict becomes even more disproportionate to the loss sustained. Thus, if it is assumed that Mrs. Dwyer would have received an average amount of $750.00 per year from the earnings of decedent throughout his expectancy, the cash value thereof would be $11,000.00. Or taking the figure of $500.00 per year, we have a present cash value of approximately $7,300.00. At $350.00 per year, the cash value would be slightly over $5,000.00.

Necessarily, in the assessment of damages in a case like this, much must be left to speculation. But there are certain facts that human experience conclusively establishes. A man engaged in the employment that decedent was can not but lose a large percentage of his earning capacity very soon after reaching the age of 45. Nor is it likely that decedent would have been able to accumulate and lay aside any considerable sum, especially considering the fact that he had not already done so, and that his power to earn money would have decreased with advancing years. The case at bar is not complicated by the presence of dependent children. The widow was the only dependent, and was herself middle aged. We submit that under all the circumstances, the verdict was grossly excessive, and is proven to be to a mathematical certainty.

189 We, of course, know that the Employers' Liability Act was framed in an attempt to alleviate the suffering that was resulting from industrial accidents; and was intended to give the recovery to those only who stood in need of it. We can not help but feel that, in view of the liberality of its provisions, the courts

should closely supervise the verdict- of juries, and unhesitatingly set aside those verdicts when they are plainly in excess of the loss that has actually been sustained. In fact, we believe that a consideration of the cases wherein the courts have been called upon to consider the reasonableness of the jury's verdict, will show that there is a tendency to closely scrutinize the jury's finding. Thus a $15,000.00 verdict for the loss of an arm and material injury to health, the injured person being 24 years of age, was reduced to $12,000.00 in Bradbury v. Chicago, Etc. Ry. Co. (Iowa) 128 N. W. 1. And a verdict for $17,545.00 for the death of a young man 19 years old, who was contributing over $400.00 to the support of his family at the time of his death, was reduced to $6,000.00.—see Duke v. St. Louis, Etc., Ry. Co., 172 Fed. 684. See also Cain v. Southern Ry. Co. 199 Fed. 211; St. Louis, Etc. Ry. Co. v. Hesterly (Ark.) 135 S. W. 874; Neil v. Idaho &c. Ry. Co. (Idaho) 125 Pac. 331.

It is earnestly submitted that the verdict is excessive and that for this reason the judgment should be reversed.

The Instruction on the Measure of Damages is Erroneous.

The instruction given by the trial court defining the measure of damages tells the jury that they should not award any sum in excess "of the aggregate probable earnings of the dec-dent." This, in effect, authorized the award of a sum equal to the "aggregate probably earnings" of decedent, which, we submit, is erroneous. There is no contention that appellee was receiving, or would have received, the total earnings of decedent. It was necessary,
190 and would have continued to be necessary, for decedent to have retained out of his earnings a sufficient amount to meet his personal expenses and even if he had given the remainder of his earnings to his wife, the amount so given would not have been his "aggregate probable earnings." The appellee was entitled to only such sum as would have compensated her for her actual pecuniary loss. That loss could not have equalled the aggregate earnings of decedent, and therefore, it was improper to advise the jury that they could make an award equal to the probable amount of such earnings. The plain meaning of the above quoted part of Instruction No. 4 was to authorize the jury to award a sum in damages by multiplying decedent's earning capacity by his life expectancy. In Stewart's Adm'r v. L. & N. R. R. Co. 136 Ky. 717 this court held that such a method of computation of damages was improper, saying:

" * * * It does not follow that this is to be computed by simply multiplying the earning power of the deceased at his death by his expectancy of life as shown by the life tables. * * * The value of a piece of machinery is not to be determined by multiplying its present earning power by the length of its probable use, but the cost of maintenance must be subtracted. The value of the human machine to his estate must be determined in like manner. It must be maintained,—that is, it must be fed, clothed and supplied

with other necessities. What the estate would lose would be the net gain."

And in C. N. O. & T. P. Ry. Co. v. Lovell's Adm'r, 141 Ky. 249, the court said:

"The loss to his estate is the amount that he will probably make and save if he should live the full limit of his expectancy of life."

So in the case at bar, the los to the appellee is not the total amount of the decedent's earnings throughout what would have been the probably duration of his life, but what he would have saved and turned over to her, or expended for her care and maintenance. Necessarily, a large part of what decedent would have made, would have been expended in the care and maintenance of himself,
191 and for this amount appellee was not entitled to recover.

And after instructing the jury that they could award damages for the pecuniary loss sustained by appellee by reason of being deprived of the decedent's "support and maintenance," they were further told that they might award damages for the loss of any "other pecuniary advantage." How far into the fields of speculation and guess-work the jury may have gone under this unbridled license, no one can tell. The size of the verdict indicates that they took full advantage of the opportunity presented.

If this had been a case wherein a recovery was sought under the provisions of the Kentucky death statute,—Section 6,—would this court sustain an award based upon an authorization given to the jury to fix the damages by multiplying the decedent's earning capacity by his life expectancy? Or, if the action were one to recover for pain and suffering, is there any doubt that the verdict would have been set aside, if the jury had been instructed not only to consider mental and physical pain, loss of earnings, etc., but also any other pecuniary loss sustained? Both of these errors exist herein, and in view of the disproportionate size of the verdict to the loss sustained, one is drawn to the conclusion that these errors materially influenced the result of the jury's deliberations.

For the foregoing reasons, it is respectfully submitted that the judgment of the Boyd Circuit Court should be reversed, and the case remanded.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN &
BROWNING,
Counsel for Appellant.

192 *Points and Authorities.*

I.

The verdict is grossly excessive.

Ill. Cent. R. Co. v. Doherty's Adm'r., 153 Ky. 363.
Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59.
Bradbury v. Chicago, Etc., Ry. Co., 128 N. W. 1.
Duke v. St. Louis, Etc., Ry. Co., 172 Fed. 684.
Cain v. Southern Ry. Co., 199 Fed. 211.
St. Louis, etc., Ry. Co. v. Hesterly, 135 S. W. 874.
Neil v. Idaho, etc., Ry. Co., 125 Pac. 331.

II.

The instruction on the measure of damages is erroneous.
Stewart's Adm'r v. L. & N. R. R. Co., 136 Ky., 717.
C. N. O. & T. P. Ry. Co. v. Lovell's Adm'r, 141 Ky., 249.

193 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Adm'x, etc., Appellee.

Receipt.

Received of appellant a copy of its brief, which it is agreed may be filed without further notice.
This 19th day of January, 1915.

R. S. DINKLE,
Attorney for Appellee.

194 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

I, Robert L. Greene, Clerk of the Court of Appeals of Kentucky, in obedience to the commands of the Writ of Error herein, herewith transmit to the Supreme Court of the United States the transcript of the record as ordered to be copied by the præcipes in the case of Chesapeake & Ohio Railway Company, appellant, vs. Richard Dwyer's Administrator, appellee, as the same appears of record and on file in my office.
In testimony whereof I have hereunto set my hand and affixed the seal of my office.
Done at Frankfort, Kentucky, on this the 23rd day of April, A. D. 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk Court of Appeals.

Fee for this transcript, $49.50.

195 Supreme Court of the United States.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Now comes the plaintiff in error, Chesapeake and Ohio Railway Company, and files with the Clerk of this court a statement of the errors on which it intends to rely, as follows, to-wit:

First. The said court erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the 7th Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky to grant a jury trial by an unanimous jury of twelve, the Boyd Circuit Court was not a court of competent jurisdiction within the provisions of the Federal Employers' Liability Act, and Section 28 of the Act of Congress of March 3, 1911, known as the Judicial Code.

196 Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury Instruction No. 4, which was in words and figures as follows:

"The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(*a*) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business ability, earning capacity, and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment
in which he was engaged, which were circumstances tending
197 to decrease the estimate of damage.

(*b*) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advantage as being equal to the probable earnings of said decedent during the whole period of life expectancy.

(*c*) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(*d*) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(*e*) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

Plaintiff in error states that it thinks that this entire record as copied by the Clerk of the Court of Appeals of Kentucky should be printed for the consideration of the errors above relied upon, and it, therefore, designates as necessary to be printed such entire record.

Dated this 27th day of July, 1915.

E. L. WORTHINGTON,
Counsel for Plaintiff in Error.

198 A copy of the foregoing was delivered to us on the 27" day of July, 1915, and service of same is now accepted, as counsel for defendant in error.

WATT. M. PRICHARD,
R. S. DINKLE,
GEORGE B. MARTIN,
Counsel for Defendant in Error.

199 [Endorsed:] 453—24705. Chesapeake & Ohio Ry. Co. v. Sarah Dwyer, Adm'x of the Estate of Richard Dwyer, Dec.

200 [Endorsed:] File No. 24,705. Supreme Court U. S., October term, 1915. Term No. 453. The Chesapeake & Ohio Ry. Co., Pl'ff in Error, vs. Sarah Dwyer, Administratrix, etc. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed July 31, 1915.

Endorsed on cover: File No. 24,705. Kentucky Court of Appeals. Term No. 453. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. James R. Gainey, Jr., administrator de bonis non of the estate of Richard Dwyer, deceased. Filed May 5th, 1915. File No. 24,705.

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Supreme Court of the United States.

OCTOBER TERM, 1915

No. 453

The Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

James R. Gainey, Jr., Administrator De Bonis Non of the Estate of Richard Dwyer, Deceased . . . *Defendant in Error.*

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

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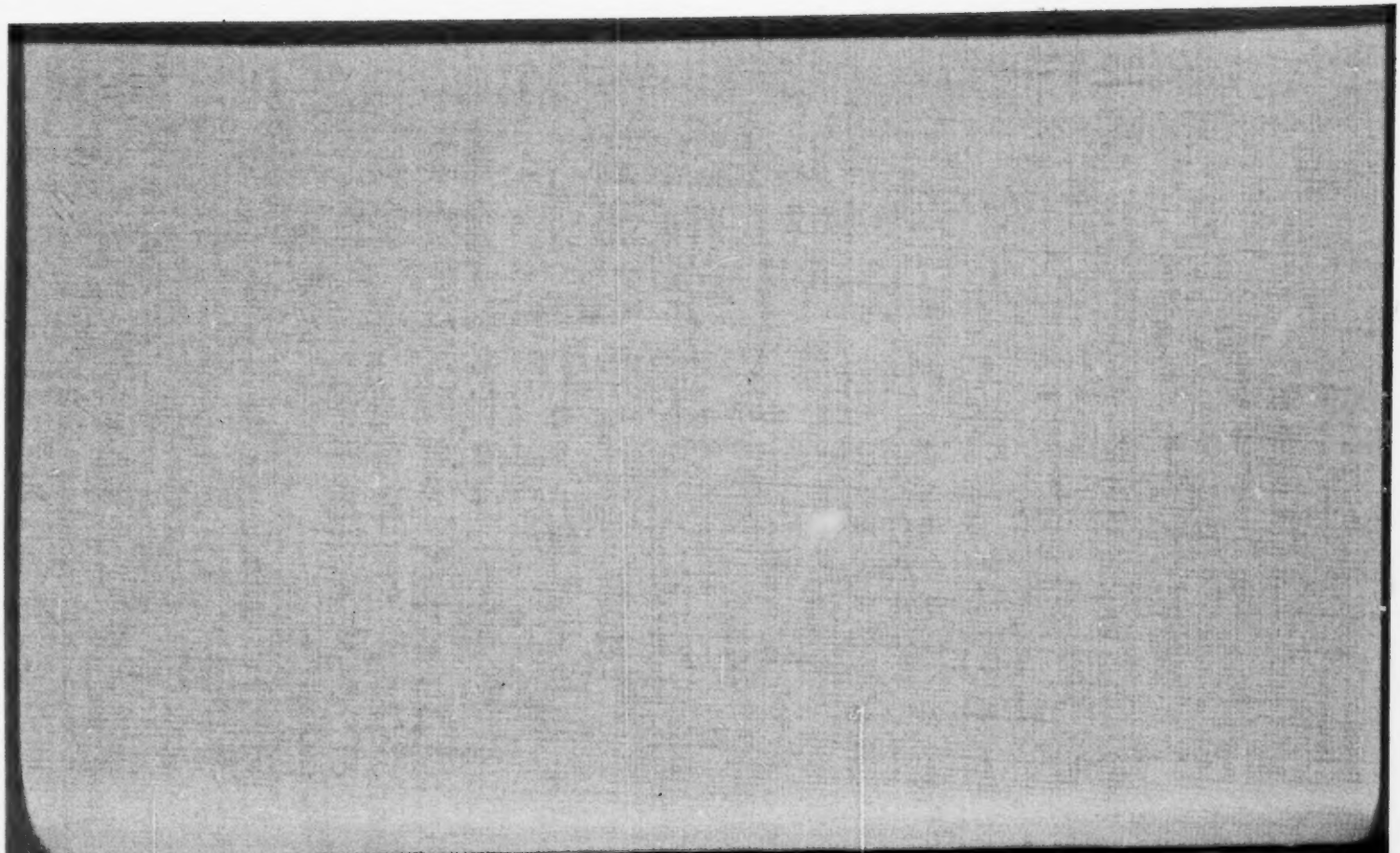

Supreme Court of the United States.

OCTOBER TERM, 1915

No. 453

The Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

James R. Gainey, Jr., Administrator De Bonis Non of the Estate of Richard Dwyer, Deceased . . . *Defendant in Error.*

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

May It Please the Court:

STATEMENT OF FACTS

This action was originally instituted in the Circuit Court of Boyd County, Kentucky, by Sarah Dwyer, as Administratrix of the estate of Richard Dwyer, deceased, to recover damages for the death of her intestate in the derailment of one of the trains of the plaintiff in error, of which the decedent was

the engineer. The action was brought under the Employers' Liability Act of Congress, of April 22, 1908, as amended by the Act of April 5, 1910 (35 Stat. at L. 65, Chap. 149, Com. Stat. 1913, Sec. 8657).

Upon the first trial of the case in the Boyd Circuit Court, the plaintiff recovered a judgment against the defendant (the plaintiff in error herein), for the sum of $14,000.00. Upon appeal to the Court of Appeals of Kentucky, this judgment was reversed and the cause remanded to the Circuit Court. The ground of reversal was the giving of an erroneous instruction by the trial court upon the measure of damages (see page 9, et seq., Transcript, *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *163 S. W.*, *752*, *157 Ky.*, *590.*)

Upon a retrial of the case in the Circuit Court, the plaintiff recovered a judgment against the defendant for the sum of $16,000.00, which judgment was subsequently affirmed by the Court of Appeals of Kentucky (see page 77, et. seq., Transcript, *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *172 S. W.*, *918*, *162 Ky.*, *427*). The defendant thereupon filed a petition for rehearing (see page 80, et seq., Transcript), upon the ground that as the statutes of Kentucky required the trial court to give an instruction authorizing nine of the jury to return a verdict, the court had no jurisdiction of the action because of its inability to give to the defendant a trial by jury as provided for in the Seventh Amendment to the Constitution of the United States. A rehearing was denied (see page 84, Transcript), and from the judgment of the Court of Appeals this writ of error is prosecuted. It may be well to state that subsequent to the docketing of the case in this court, the original administratrix died, and by an agreed order of revivor,

the case was redocketed in the name of the defendant in error, as administrator *de bonis non* of the estate of Richard Dwyer.

As will be seen from the above, there were two trials of the case in the Boyd Circuit Court. The facts as disclosed by the evidence were practically the same on both trials, and may be summarized as follows: The plaintiff's intestate was a locomotive engineer in the employment of the defendant railway company. He was killed on May 12, 1910, at England Hill, in Boyd County, Kentucky, by the derailment of the train upon which he was at the time employed as engineer. The train in question was a freight train, and was being operated by two engines, the second engine being the one that the decedent had charge of. At the place of the accident the railroad track is located in a cut, the banks of which arise in height several feet above that of a train. The accident was caused by a land slide from one side of the cut, which caused rocks and earth to be deposited upon the track in such quantities that when struck by the moving train the two engines and several cars were derailed, and the decedent, being thrown under the engine of which he was in charge, received injuries which shortly thereafter resulted in his death. Several grounds of negligence were charged in the pleadings, but the only one actually relied upon was the alleged negligence of the railway company in failing to take proper precautions to prevent the land slide in question. As to this alleged negligence, the evidence was conflicting.

The sole beneficiary of the action was the decedent's widow, Sarah Dwyer, who qualified as administratrix of the decedent's estate, and as such originally instituted this action. As above stated, Mrs. Dwyer died since the granting of this writ of error.

ASSIGNMENT OF ERRORS

The errors assigned are as follows (see pages 87-89, Transcript):

First. The Court of Appeals of Kentucky erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the Seventh Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky, to grant a jury trial by a unanimous jury of twelve, the Boyd Circuit Court was not a court of competent jurisdiction within the provisions of the Federal Employers' Liability Act, and Section 28 of the Act of Congress of March 3, 1911, known as the Judicial Code.

Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury instruction No. 4, which was in words and figures as follows:

> "The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by

reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife, has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

"And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

"The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

"Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(a) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business ability, earning capacity, and probable duration of life, all of which went to enhance

the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage.

(b) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advantage as being equal to the probable earnings of said decedent during the whole period of his life expectancy.

(c) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(d) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(e) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

ARGUMENT

I.

THE BOYD CIRCUIT COURT DID NOT HAVE JURISDICTION OF THIS ACTION.

The Constitution of the state of Kentucky (Sec. 248) provides as follows:

> "The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict which shall have the same force and effect as if rendered by the entire panel."

The legislature of Kentucky carried this constitutional provision into effect by the enactment of *Sec. 2268, Kentucky Statutes*, which provides as follows:

> "That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

It is our contention, under the first three assignments of error that the limitation of the Seventh Amendment to the Federal Constitution preserving the common law right of trial by jury, i. e., a jury of twelve whose verdict must be unanimous, inheres in every right of action created under the authority of that Constitution, and that as the courts of the state of Kentucky are unable, by reason of the constitutional and statutory provisions above quoted, to secure to litigants that right, they are without jurisdiction of actions arising under the Federal Employers' Liability Act; and that, therefore, the Boyd Circuit Court was not what is denominated in the Act as a "state court of competent jurisdiction." This proposition is involved in all the cases which are heard with this case, to-wit: *The Ches. & Ohio Ry. Co.* v. *Kelley's Admx.*, (*No. 321*), *St. Louis & San Francisco R. Co.* v. *Brown*, (*No. 399*), *Minneapolis & St. Louis R. Co.* v. *Bompolis*, (*No. 478*), *Louisville & N. R. Co.* v. *Stewart's Admx.*, (*No. 485*), *The Ches. & Ohio Ry. Co.* v. *Carnahan*, (*No. 743*); and one general brief discussing this common question has been filed in each

of the cases. We refer to that brief for a full discussion of the proposition.

The proceedings in the trial courts were not, however, the same in all the cases, and this makes it necessary for us to consider herein such features as are peculiar to this case.

It may be suggested that the want of jurisdiction in the state court was not specially set up and claimed in the trial court, nor until the filing of the petition for rehearing upon the second appeal to the Court of Appeals, and that, therefore, plaintiff in error can not now be heard to present such question in this court. We are aware that the general rule is well settled that it is too late to raise a Federal question for the first time in a petition for rehearing in the state court of last resort after that court has pronounced its final decision, unless that court in fact entertains the petition for rehearing and passes on the Federal question raised therein.

But it is submitted that the aforesaid rule does not apply to a Federal question of the character here presented. If the Boyd Circuit Court did not have jurisdiction of the *subject matter* of the action, then it could not acquire such jurisdiction by the failure of the defendant to object thereto at the inception of the case or during the subsequent progress thereof. The question as to the jurisdiction of the *subject matter* of an action can not be waived but may be raised at any time, and should be raised by the court itself whenever presented to its notice. See *Mississippi & Rum River Boom Co.* v. *Patterson, 93 U. S., 403, 25 L. Ed., 206; Mansfield, Etc., R. Co.* v. *Swan, 111 U. S., 379, 28 L. Ed., 463; Cameron* v. *Hodges, 127 U. S., 322, 32 L. Ed., 132; Metcalfe* v. *City of Watertown. 128 U. S., 586, 32 L. Ed., 543; Blacklock* v.

Small, 127 U. S., 96, 32 L. Ed., 70; Chicago, B. & Q. R. Co. v. *Willard, 220 U. S., 413, 55 L. Ed., 521.* In the case last cited it was said:

> "It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S., 379, 382, 28 L. Ed., 462, 463, 4 Sup. Ct. Rep., 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This rule was said to be inflexible and without exception, and has been uniformly sustained by this court."

Moreover, this particular Federal question under discussion is not the character of question that is required to be "specially set up or claimed." As has been repeatedly pointed out, there are three classes of cases in which this court is given appellate jurisdiction over final judgments of state courts of last resort, to-wit; *first,* where there is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; *second,* where there is drawn in question the validity

of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; and, *third*, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity *specially set up and claimed* by either party under such Constitution, statute, commission or authority. See *Mutual Life Ins. Co.* v. *McGrew, 188 U. S., 291, 47 L. Ed., 480; Baltimore & P. R. Co.* v. *Hopkins, 130 U. S., 210, 32 L. Ed., 908.*

Obviously, the question under consideration falls within the second class above named, for it draws in question the validity of an authority exercised under a statute of the state of Kentucky on the ground of its being repugnant to the Seventh Amendment to the Constitution of the United States.

This being true, it follows that the requirement that the Federal question should have been "specially set up and claimed," has no application to this case. Such limitation is applicable only to the third class of cases above named,—it does not apply to cases falling within the first or second class. This difference is clearly pointed out in *Columbia Water Power Co.* v. *Columbia Electric Co., 172 U. S., 475, 43 L. Ed., 521*, wherein it was said:

> "There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. * * *
>
> "But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or

> the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against review of such question here."

The question as to the jurisdiction of the Boyd Circuit Court was necessarily involved in the case, and the affirmance of its judgment was, of necessity, a decision sustaining its jurisdiction.

It is also to be noted that the defendant objected and excepted to the giving of an instruction authorizing a three-fourths verdict (see page 74, Transcript), and this alleged error was also set out and specified as one of the grounds for a new trial. Also, the verdict upon which the judgment appealed from was rendered, was returned and signed by only nine of the jury.

It is accordingly submitted that the Federal question under consideration is sufficiently presented in the Record.

II.

THE INSTRUCTION ON THE MEASURE OF DAMAGES WAS ERRONEOUS.

The Boyd Circuit Court gave to the jury the following instruction on the measure of damages (see pages 73, 74, Transcript):

> "The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and

reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife, has sustained by reason of being deprived of such support and maintenance, *other pecuniary advantage*, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, *not exceeding, however, the sum of the aggregate probable earnings of decedent*, but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

"And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

"The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

The concluding paragraph of this instruction was given upon the defendant's motion, but there was an objection and exception by the defendant to the giving of the preceding part

of the instruction. The following errors in the aforesaid instruction are now complained of:

(a) By the above instruction (No. 4) the jury were told to award the widow of the decedent such sum as would reasonably compensate her for the pecuniary loss sustained, not to exceed the "aggregate probable earnings of the decedent." The effect of the instruction was to authorize the jury to award in a lump sum the aggregate of what the widow would have received from year to year during the whole of the decedent's life. That the jury did exactly this, is inferable not only from the size of the verdict, but also from the fact that the Court of Appeals of Kentucky adopted this manner of computation in order to sustain the verdict.

It is earnestly submitted that a verdict based upon the above method of calculation does not represent the actual pecuniary loss sustained. To avoid a result so manifestly erroneous as that reached in this case, the jury should have been told to award a sum which represented the *present cash value* of the reasonable expectation of pecuniary advantage to the surviving dependent.

The proper measure of damages in such cases was clearly stated by the Court of Errors and Appeals of New Jersey in *Hackney* v. *Delaware & A. T. & T. Co., 69 N. J. Law, 335, 55 Atl., 252*, where it is said:

> "In none of the cases cited has it been in express language set forth that it is the present value of the pecuniary loss which the jury is to find, although such an expression is usually found in the charges of the trial judges at the circuit. In the charge before us, the jury were permitted to consider the whole amount of the possible pecuniary benefits which the widow and next of kin would have re-

ceived from time to time during the life of the intestate had he lived, and to sum that up as the measure of damages. That instruction did not require the taking into account of the present possession of the whole fund, and the resultant benefit therefrom, and the future accretions thereon, and hence was erroneous."

And in *McCabe* v. *Narragansett E. L. Co., 26 R. I., 427*, the following method of computing the loss to the surviving dependents is stated:

> "It is obvious, too, that the loss sustained by the plaintiff here is the present cash value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this, it is, of course, necessary to ascertain first the gross amount of such prospective income or earnings; then to deduct therefrom what the deceased would have to pay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits; and then to reduce the net result so obtained to its present value."

To the same effect are the following decisions: *Louisville & N. R. Co.* v. *Trammel, 93 Ala., 354; Benton* v. *R. R. Co., 122 N. C., 1007, 30 S. E., 333; Rudiger* v. *Chicago, Etc., Ry. Co., 101 Wis., 292, 77 N. W., 169; Southern R. Co.* v. *Hill. 139 Ga., 549, 77 S. E., 803; Irvin* v. *Southern R. Co., 164 N. C., 5, 80 S. E., 78, 7 N. C. C. A., 824, (Note C); Thornton* v. *Seaboard A. L. R. Co., 98 S. C., 348, 7 N. C. C. A., 824, (Note C).*

Manifestly, the rule laid down in the foregoing decisions states the correct method of computing the damages sustained, as the dependent beneficiary is entitled to receive only

that of which he was deprived by the death, which is an annuity during the continuance of the dependency, and if the amount of the annuity be simply multiplied by the number of years of the dependency, and the product paid at once in cash, the beneficiary receives much more than the actual loss sustained, as was the result in the case at bar. The expectation of the decedent in this instance was approximately twenty-four years. At the time of his death he was earning regularly $150.00 per month, or $1,800.00 per year. Of this amount, the widow could not reasonably have expected more than half, or $900.00 per year, even if the decedent had maintained his earning powers unimpaired for the remainder of his expectancy. The present value of a right in a sum which would yield at a 6 per cent rate of interest an income of $900.00 per year for the full period of the decedent's expectancy would only be $9,150.00, an amount considerably less than the verdict returned in this case. Or, to look at the matter in another way, the amount awarded by the jury would at 6 per cent,—the legal rate of interest in Kentucky,—yield an annual income to the widow of $960.00 per year, and at the end of the period of expectancy she would still be in possession of the full amount of the principle. This court, of course, can not revise the finding of a jury because the verdict may have been excessive. But the above figures are presented for the purpose of showing that the jury, acting under the authorization contained in the instruction upon the measure of damages, necessarily adopted an unlawful method of computation. That this was probably done by the jury is evidenced by the fact that this was actually done by the Court of Appeals of Kentucky in sustaining the verdict.

(b) Said instruction is also erroneous in that it authorized

the jury to return a verdict for an amount "not exceeding the sum of the aggregate probable earnings of decedent." It is a manifest proposition that the widow's pecuniary loss could not possibly have equalled the sum of the aggregate earnings of the decedent, for out of these earnings would necessarily have to come the decedent's incidental living expenses. The instruction as worded was necessarily confusing and misleading. Under it the jury were authorized to infer that the widow's pecuniary loss could equal the sum of the decedent's aggregate earnings, which is plainly wrong.

Furthermore, it is submitted that the amount of the decedent's earnings, either gross or net, do not furnish a guide for computing the pecuniary loss sustained by the surviving dependent. If the right of action was one for the recovery of damages sustained by the decedent's estate, as is the case under the Kentucky statute permitting a recovery for death by the wrongful act of another, then the sum of the probable aggregate net earnings of the decedent might be accepted as the limit to which a jury could go in their verdict. But under the Federal Act, the recovery is not for the loss sustained by the estate, but for the loss resulting to the beneficiaries named. The same criticism can be made of this instruction as was made by this court of the instruction considered in *Kansas City Southern R. Co.* v. *Leslie, 238 U. S., 599, 59 L. Ed., 1478.*

(c) By said instruction the jury were advised that they might take into consideration "the pecuniary loss * * * which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, (and) *other pecuniary advantage*, if any, which the jury may find

and believe from the evidence she would have derived from decedent." The effect of the authorization thus given to award damages for the loss of *other pecuniary advantages*, was to permit the jury to consider and award damages for matters not susceptible of measurement by money standard. How far the jury may have gone into fields of guesswork and speculation under this unbridled license, no one can tell, but the size of the verdict indicates that they took full advantage of the opportunity presented. So extremely indefinite is the term "other pecuniary advantage," that the jury may well have taken into consideration and included in their award damages for the loss of the decedent's care and companionship, and therefore, the instruction falls under the ban of the criticism made of such an instruction in *American Railroad Co.* v. *Didrickson*, *227 U. S.*, *145*, *57 L. Ed.*, *456*. See also *New York, Etc., R. Co.* v. *Niebel*, *214 Fed.*, *952*.

It is certain that the term "other pecuniary advantage," as used by the trial court, is not synonymous with the words "support" and "maintenance," and the jury must necessarily have understood the term to mean some loss in addition to the loss of support and maintenance. This being true, it following that the direction to award damages for the loss of such "other pecuniary advantages," was not authorized by the pleadings or the evidence, as there was neither allegation or proof of any loss sustained by the widow other than the loss of support and maintenance. See *Michigan Cent. R. Co.* v. *Vreeland*, *227 U. S.*, *59*, *57 L. Ed.*, *417*.

The foregoing errors are accentuated by the disproportionate size of the verdict to the loss sustained by the widow.

who was the sole beneficiary, and who died herself five years after the death of her husband.

It may be well to state that under the Kentucky practice, the defendant is not estopped to complain of the foregoing errors in the instruction under consideration because of the fact that it did not offer a correct instruction on the measure of damages. The right of the defendant, under the state practice, to complain of any errors in the instruction, is stated in the opinion delivered herein by the Court of Appeals upon the first appeal, (see *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *157 Ky.*, *590*, *163 S. W.*, *752*), as follows:

> "It is insisted for appellee that, as appellant did not on the trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. L. & E. Ry. Co. v. Crawford, 155 Ky., 723, 160 S. W., 267; South Cov. & C. St. Ry. Co. v. Core, 96 S. W., 562, 29 Ky. Law Rep., 836."

See also, *Louisville, H. & St. L. Ry. Co.* v. *Roberts*, *144 Ky.*, *820*, *139 S. W.*, *1073*.

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

E. L. Worthington

W. D. Orchard

Talbott Browning

P. K. Wallace

Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1915.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error.

Against) No. 453.

JAMES R. GAINEY, JR., Administrator, Etc., Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

STATEMENT OF FACTS.

The deceased, Richard Dwyer, while employed by the plaintiff in error as engineer, lost his life, on the 12th day of May, 1910, by negligence of the Railway Company, in permitting a large rock to remain on the side of a deep cut on its right-of-way, and in allowing said rock to fall upon its track, thereby

causing the engine which deceased was operating to turn over and kill him.

A trial was had of this action, at the March term of the Boyd Circuit Court, 1913, and a verdict and judgment for $14,000.00 was rendered. An appeal was taken to the Court of Appeals of Kentucky by plaintiff in error, and the judgment of the lower court was reversed on the ground that the instruction given on the measure of damages was erroneous. The opinion on that appeal will be found in 157, Ky., 590, and at page 10 of the record.

A second trial of the action was had at the June term, 1914, of the Boyd Circuit Court, and a judgment and verdict for $15,000.00 were rendered, from which an appeal was taken to the Court of Appeals of Kentucky and there affirmed. (Record, page 77). The opinion upon this appeal will be found in 162 Ky., 427. A petition for rehearing in this cause, in the Court of Appeals of Kentucky, was filed by plaintiff in error (Record, page 80), which was overruled by said court (Record, page 84). A petition for a writ of error was then filed by it in said court (Record, page 85), which was allowed (Record, page 86), and assignment of errors made by it (Record, page 87).

ARGUMENT

The first contention of plaintiff in error is, that the Boyd Circuit Court did not have jurisdiction of this action because a trial thereof in said court is inhibited by reason of the Seventh Amendment to the Constitution of the United States. That question is involved in all the cases which are heard with this case, to-wit: The Chesapeake and Ohio Ry. Co. v. Kelly's Admx., (No. 321); St. Louis & San Francisco R. Co. v. Brown, (No. 399); Minneapolis & St. Louis R. Co. v. Bombolis, (No. 478); Louisville & Nashville R. Co. v. Stewart's Admx., (No. 485); The Chesapeake & Ohio R. Co. v. Carnahan, (No. 743); and one general brief discussing this common question has been filed in each of the cases. We refer to that brief for a full discussion of the proposition. We desire to add to what is there said, that the contention that the trial of this character of case in the State Court is unwarranted because of the Fourteenth Amendment to the Constitution of the United States does not arise in the case at bar because not assigned as error or properly made a ground for reversal herein, and by reason of its failure to do so it cannot be heard to urge that the trial in the State Court was unauthorized, because of said Fourteenth Amendment.

See,

Chapin v. Fye, 45 L. Ed., (U. S.) 119.

in which case the Supreme Court, discussing the above proposition, said:

"A constitutional question which will

> give jurisdiction to the Supreme Court of the United States on writ of error to a state court is not raised by a contention in the state court that the state law in question violates the 5th and 7th Amendments of the Federal Constitution, and a contention, made in the assignment of errors in the Supreme Court of the United States, that the law violates the 14th Amendment, since the constitutional question must be raised in the state court, and the reference to the 5th and 7th Amendments is insufficient for that purpose because those amendments have no application to the powers of the State."

But if it should be held that the assignment of errors as to the Seventh Amendment carries with it the Fourteenth Amendment, we insist that the Fourteenth Amendment does not prohibit the state court, in which the law does not require a unanimous verdict of the jury, from trying an action arising under Federal law.

In deciding the case of **Gibson v. Bellingham & N. Ry. Co., 213 Fed., 488,** the Court said:

> "It has been frequently held that this provision contemplated a jury as constituted at common law of which the unanimous verdict of twelve men was an essential feature. Thompson v. Utah, 170 U. S., 343; American Pub. Co., v. Fisher, 166 U. S., 464; Rasmussen v. United States, 197 U.S., 516; Black v. Jackson, 177 U.S., 349. Those were cases, however, arising in the United States District or Circuit Courts, or in the territories, the courts of which were created by

Congressional act. It has been held by a long line of decisions that the Seventh Amendment does not apply to the states, and that a state is not inhibited by the federal constitution from providing for a jury of less than twelve men, or for a verdict that is not unanimous. Edwards v. Elliott, 21 Wall. 532; Barron v. Baltimore, 7 Pet. 243; Twitchell v. Pennsylvania, 7 Wall. 321; Walker v. Sauvinet, 92 U.S., 90; Maxwell v. Dow, 176 U. S., 581.

"Nor is a trial under a state statute abridging the number of jurors, or dispensing with the feature of unanimity, a denial of 'due process' within the inhibition of the 14th amendment which does not apply to the States. Hurtado v. California, 110 U. S., 517; Kennard v. Louisiana, 97 U. S. 480; Davidson v. New Orleans, 96 U. S. 97. Congress cannot enlarge the jurisdiction of a state court, nor has it power to prescribe rules of procedure or methods of trial to be followed in a state tribunal. Claflin v. Houseman, 93 U. S., 141."

It is necessary, under the law of Kentucky, in order to raise the question of jurisdiction of the lower court to try a cause, to either file a special demurrer or a plea to the jurisdiction of the trial court, before any steps are taken by a defendant therein.

See,

Sections 92 and 118, Ky. Civil Code of Practice.

The plaintiff in error not only failed to raise the question of jurisdiction in the trial court, but failed

to raise it in the appellate court on appeal thereto, except in its petition for a re-hearing after the case had been decided by that court, which petition for re-hearing the said appellate court overruled without responding thereto, (Record, page 84). This is not sufficient to bring the question before this court on a writ of error.

> Winona & St. Paul Land Co. v. Minn., 159 U. S., 540; Zimmerman v. Nebraska, 115 U. S., 54; Webber v. Rogan, 188 U. S., 10; Pim v. St. Louis, 165 U. S., 273; Mallet v. North Carolina, 188 U. S., 589; Chappell v. Bradshaw, 128 U. S., 117; Seaboard Air Line Ry. Co. v. Duval, 225 U. S., 77; Mutual Life Ins. Co. of N. Y. v. McGraw, 188 U. S., 291; Forbes v. State Council of Va., 216 U. S., 396; 54 L. Ed., 534; Waters Pierce Oil Co. v. Texas, 212 U. S., 112; 53 L. Ed., 431.

In the case of,

McCorquodale v. Texas, 211 U. S., 432.

the Court said:

> "An order of the highest court of the state on motion for rehearing, which recites that the cause came on to be heard on said motion, and 'the same being considered by the court, said motion is overruled', does not show that the court passed on the federal question, so as to sustain a writ of error from the Supreme Court of the United States."

In passing on the petition for rehearing in the case at bar, the Court entered the following order:

> "The court being sufficiently advised,

orders that the petition for rehearing herein be and the same is now overruled."

It is true that the plaintiff in error excepted to the giving of instruction No. 6 by the trial court, (Record, page 75), but we submit that this did not call the attention of the trial or appellate courts to the question of jurisdiction here involved.

THE INSTRUCTION OF THE LOWER COURT DEFINING MEASURE OF DAMAGES WAS NOT ERRONEOUS.

1.

This instruction is criticised because the jury, in ascertaining the pecuniary loss to the widow, was authorized to consider the age, habits, business ability, and the probable duration of life of the decedent.

If these are not relevant facts properly to be considered in determining the loss to the widow, we cannot conceive what would be; certainly all of them have a direct bearing on the question. The contention, if so, that such facts tend to enhance the damages, is no ground of complaint.

If his age was such that there was a long expectancy to him; his habits good, so as to warrant the belief that his earnings would not be wasted or his health impaired thereby; his business ability of the kind that would justify a finding that he would be able to get and hold positions of profit; and if

the probable duration of life under all the proven facts would have been many years, then why in fairness and justice should not such matters be considered? The Court did not tell the jury, as claimed by plaintiff in error, that these facts should enhance the damages, but simply advised the jury to consider decedent's age, whether old or youthful; his habits, whether good or bad; his business ability, whether of a high or low order; the probable duration of his life, whether long or short.

The claim that the jury should have been further advised to consider his health and the hazardous nature of his employment is without merit, because these were necessarily involved in a consideration of the probable duration of life. We shall not notice this contention further, as plaintiff in error has apparently abandoned it in argument and has contented itself with referring to it only as one of the assignments of error.

II.

More hypercritical, if possible, than the above, is the complaint of the language to the effect that the recovery should not exceed the "aggregate probable earnings of decedent".

We are at loss to know how this could have prejudiced the Railway Company and we are not enlightened to any extent by its brief. By no possibility could any man of the least common sense construe the language used to mean anything more or less than it says, and that is, that the finding should be measured by the pecuniary loss to the

widow, but in no event could exceed the aggregate probable earnings of decedent. It was simply a limitation upon the amount of recovery, perhaps not necessary, but certainly not misleading.

III.

The Court permitted the jury to consider, in addition to the widow's loss of support and maintenance, "other pecuniary advantage, if any", which she might reasonably have expected to have derived from her husband but for his death. This, we submit, the law allows. If there was no proof of any such pecuniary advantage, the law so given was an abstract proposition and the language possibly unnecessary but harmless. If the proof warranted a reasonable inference that there was a reasonable expectation that she would have received such pecuniary advantages other than her support, she was entitled to the benefit of it. "Pecuniary" advantage is one of a money nature and such as the decisions under the Employer's Liability Act recognize as proper for consideration.

IV.

It is further contended that the jury should have been told to award plaintiff a sum which represented the **present cash value** of the reasonable expectation of pecuniary advantage to the surviving dependent. Cases from various state courts are cited to sustain this contention. However, no decision by this

Court, or of any Federal Court, is cited holding that the amount of recovery should be so ascertained. There is not, among the many decisions rendered by this Court construing the Federal Employer's Liability Act, a single one in which this theory of calculation is adopted. On the contrary, the substance and effect of all of them, as we understand them, is to fix the criterion of recovery at the pecuniary loss to the surviving beneficiary.

The Court of Appeals of Kentucky, in responding to a similar contention made in the case of **C. & O. Ry. Co. v. Kelly's Admr., 160 Ky., 296,** holds same to be without merit, and, in the opinion, says:

> "Appellant insists, under the principles of Gulf & Colorado Railway Co. v. McGinnis, 228 U. S., 173, and Mich. Central Co. vs. Vreeland, 227 U. S., 59, that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded ought to be such that if placed at interest, would be wholly consumed when the time of dependency ceased and that the jury should have been so instructed. In the McGinnis case, supra, the court construes the Employer's Liability Act to provide compensation to certain surviving relatives of the employe, 'for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given'. With reference to the apportionment of the benefit of each, the jury must do this, 'measured by his or her individual loss'. We are unable to see that

the McGinnis case, supra, either in principle or by intimation, requires that the measure of damages in the instruction to juries should be any different from the one in this case. In fact, the instructions, as above quoted, seem to have been drawn to conform to the principles announced in the McGinnis case. The instructions limited recovery to the actual pecuniary loss. Their whole loss was sustained at the time of his death. There is no more reason in appellant's asserting that the defendant should have discounted the loss than there is that the Railway Company should be adjudged to pay a fixed sum annually, semiannually, or monthly for their support. The award of the jury should be for the pecuniary loss suffered.

While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value, of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary. We believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case."

The instruction in the case at bar is the same in substance and almost identical in words with the one given in the Kelly case from which the above quotation is made.

V.

It is admitted by brief of counsel for plaintiff in error that this Court has no power to revise a finding of damages by the lower court on ground of excessiveness. Therefore, it becomes unnecessary for us to respond to the claims made by counsel that the finding in this case was excessive. We believe it can be clearly demonstrated that the pecuniary loss to the widow, the sole beneficiary, was in excess of the verdict found by the jury, but for the reason given do not feel that it is necessary to do more than call the Court's attention to the opinion of the Kentucky Court of Appeals, appearing on page 77 of the Record, where it is conclusively shown that the widow would have probably received in money from her husband, had he lived, an amount in excess of the jury's finding.

Further referring to the instruction on the measure of damages as a whole, we wish to direct the Court's careful attention to the entire instruction with the confident belief that it will be found by the Court that the instruction was so guarded and carefully worded, as that the jury could not possibly have been misled into believing that they were authorized to find any sum for the plaintiff other than what would compensate her for the pecuniary loss occasioned by the death of the decedent. It does not, as claimed by plaintiff in error, authorize the jury to go into fields of speculation in fixing the damages. Not only in one place in the instruction, but in three different places, the jury is told

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
M. J. BARNOW. } No. 962.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the Criminal Appeals Act, 34 Stat. 1246 moves the court to advance this cause for hearing on a day convenient to the court at the next term.

Defendant was indicted in the District Court of the United States for the Eastern District of Pennsylvania for falsely pretending to be an employee of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," with intent to defraud certain persons, in violation of section 32, chapter 4, of the Criminal Code.

A demurrer to the indictment was sustained, the court holding in substance that under section 32 the

gist of the offense is the false impersonation of an officer or employee of the United States and that that section does not include impersonation of an agent of the Government to sell books where no such employee exists.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

MAY, 1915.

○

distinctly that the recovery should be measured by the pecuniary loss to the widow.

This is the central idea embodied in the instruction and is the same advanced in all the opinions where the question was involved in cases decided by this Court.

In each and all of such cases, and cases involving like questions in the lower Federal Courts, the same idea is expressed, and the measure of damages, in substance, always stated to be the pecuniary loss which the dependent's beneficiary suffered. Indeed, counsel for plaintiff, in effect, as we understand their brief, recognize that this is the correct measure, their complaint only being that the instruction did not go into further detail by advising the jury as to how they would arrive at this pecuniary loss. In other words, there is practical confession that the instruction was right, (aside from the criticisms as to certain phrases used which we have heretofore noticed), but that it did not go far enough.

ALLEGED ERROR IN INSTRUCTIONS WERE NOT PROPERLY PRESERVED EITHER UNDER THE STATE PRACTICE OR THE PRACTICE OF THIS COURT.

It is our contention that the plaintiff in error waived whatever error, if any there was, in the measure of damages instruction. Upon the motion

of the Railway Company, the following part of that instruction was given by the Court, viz:

> "The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, **and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer.**"

This clause of the instruction was added to the preceding part which the Court had prepared, upon motion of the Railway Company, which was, in effect, a request that the instruction prepared by the Court be modified to the extent indicated in this clause. Though formal exception was taken to the preceding part of the instruction, yet the asking that it be modified in the manner stated was, in effect, an acquiescence by the Railway Company in giving the instruction as modified by the clause prepared by its counsel.

By this very clause, the Court will note that the Railway Company asks the Court to tell the jury that the damages should be measured by the pecuniary loss to the widow.

This is the same idea expressed in the former part of the instruction and by its asking that the damage should be so measured, it led the parties

to believe, and the Court to believe, that the instruction was satisfactory, in fixing the pecuniary loss as the criterion without going into any further details, by advising the jury as to how this should be ascertained. They were content to have the question put to the jury in this form, without the modification which they now contend should have been added, to the effect that they could only allow the present cash value of the reasonable expectation of pecuniary advantage. If error, it was in failing to incorporate this into the instruction it was invited by the Railway Company and of which, under the circumstances, they are clearly estopped to complain.

Furthermore, the failure to incorporate the present value theory, and the failure to call the jury's attention to the matter of the health of decedent and hazardous nature of his employment, if error at all, was not sufficiently preserved for review by this Court, either under the practice in the state Court or under the practice of this Court. To have preserved such question as error, it was necessary that the plaintiff in error should have offered an instruction embodying these ideas. If the instruction was correct in form, as we have argued, then the only error consisted in the failure of the Court to instruct upon questions above mentioned. If the Court gave the law right so far as it went, it is not its duty to give all of the law.

In the case of L. & N. Ry. Co. v. Woodford, 153 S. W., 722, 156, Ky., 398, the Court of Appeals of Kentucky said:

"It is not the duty of the trial judge,

> in a civil case, to give all the law of the case, and a party desiring an instruction upon which no instruction is given, or upon which those given are incomplete, must request it in order to entitle himself to have the question reviewed."

In Patterson v. Moss, 97 S. W., 379; 30 Ky. L. R., 10, the Court of Appeals of Kentucky said:

> "It is a well settled rule of this court that a litigant cannot complain of instructions, correct in themselves though inadequate, given by the court unless he offers additional instructions to be given in lieu thereof."

In L. & N. Ry. Co. v. Wilkin's Guardian, 136 S. W., 1024, the Court said:

> "Where the court has given an instruction in the terms asked by a party, he, having obtained all he asked, cannot complain that the court has not gone further than he asked by giving other instructions, although it might properly have done so."

The above is applicable to the case at bar, because the Railway Company asked, and the Court gave, an instruction making the criterion of recovery the pecuniary loss to the widow. Not having asked the Court to go further and explain how this pecuniary loss should be determined, it is not in position to complain.

In L. & N. v. Simrall's Admr., 127 Ky., 55;

104 S. W., 1011, the Court of Appeals of Kentucky said:

> "It is a well settled rule of this court that a litigant cannot complain of instructions, correct in themselves though inadequate, given by the court, unless he offers additional instructions to be given in lieu thereof."

In Loughridge v. Baugh, 118 S. W., 321 the same court said:

> "The plaintiffs asked no instruction defining further adverse possession, and as the instruction which the court gave is correct as far it goes, the plaintiffs cannot complain that other instructions were not given."

In Burdette vs. Mullins' Extr., 110 S. W., 855, the same court said:

> "The defendant did not ask any other instruction on the trial. Our rule is not to reverse a case for the failure of the court to give any instructions which the appellant did not ask, where the instructions which the court gave are correct as far as they go."

It is a settled policy of this Court, evidenced by many decisions, not to permit a party to rely for reversal upon alleged error unless specifically drawn to the attention of the lower court.

It was held by this Court in the case of Ill. Cent. Ry. Co. v. Skaggs, (Advance opinions, October Term, 1915, page 251), that even where error was sufficiently preserved under the state practice, that

this Court would not notice it unless preserved as required by its practice. The Court said:

> "While under the local statute (Gen. Stat., Minn., Sec. 7830), the plaintiff in error was permitted, (without taking exceptions at the trial), to specify upon motion for new trial, alleged errors in the rulings on instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it should be set aside because of the failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called."

Therefore, we contend that if the plaintiff in error desired any addition amplification, or qualification, in order to present its point of view to the jury, it should have made appropriate request therefor.

We respectfully submit that there was not substantial error in the proceedings of the lower court warranting a reversal, none that was prejudicial, and that error, if any committed, was invited by plaintiff in error and was not sufficiently preserved under the State or Federal practice to warrant review by this Court. Substantial justice has been done and an affirmance is respectfully prayed.

R. S. DINKLE, Catlettsburg, Ky.,
WATT M. PRICHARD, Catlettsburg, Ky.,
GEORGE B. MARTIN, Catlettsburg, Ky.,
Attorneys for Defendant in Error.

POINTS AND AUTHORITIES.

1. Objection to the jurisdiction of the lower court was not seasonably made.

Chapin v. Fye., 45 L. Ed. (U. S.), 119;
Ky. Civil Code of Practice, Sec. 92 and 118;
Winona & St. Paul Land Co. v. Minn., 159 U. S., 540;
Zimmerman v. Nebraska, 115 U. S., 54;
Webber v. Rogan, 186 U. S., 10;
Pim v. St. Louis, 165 U. S., 273;
Mallett v. North Carolina, 188 U. S., 589;
Chappell v. Bradshaw, 128 U. S., 117;
Seaboard Air Line v. Duval, 225 U. S., 77;
Mutual Life Ins. Co. of N. Y. v. McGrew, 188 U. S., 291;
Forbes v. State Council of Va., 216 U. S., 396; 54 L. Ed., 534;
Waters Pierce Oil Co. v. Texas, 212 U. S., 112; 53 L. Ed., 431.

2. Order on motion for rehearing overruling same without response does not show that lower court passed on federal question so as to sustain a writ of error.

McCorquodale v. Texas, 211 U. S., 432.

3. Complaint that certain phraseology used in the measure of damage instruction was misleading is without merit, because it is evident that plaintiff in error was not prejudiced thereby.

4. Present cash value theory is not correct in principle and has never been sanctioned by the Supreme Court of the United States or lower Federal Courts.

   C. & O. Ry. Co. v. Kelly's Admr., 160 Ky., 296.

5. There was no substantial error in the measure of damage instruction, as a consideration of it as a whole shows clearly that the jury were limited to finding the "pecuniary loss" to the dependent beneficiary.

6. If errors were in the measure of damage instruction, same were invited by plaintiff in error and were not properly preserved as ground of error either under the state practice or the practice of this court.

   L. & N. Ry. Co. v. Woodford, 153 S. W., 722; 156 Ky., 398;
   Patterson v. Moss, 97 S. W., 397; 30 Ky., L. R., 10;
   L. & N. Ry. Co. v. Wilkin's Guardian, 136 S. W., 1024;
   L. & N. Ry. Co. v. Simrall's Admr., 127 Ky., 55; 104 S. W., 1011;
   Loughridge v. Baugh, 118 S. W., 321;
   Burdette v. Mullin's Extr., 110 S. W., 855;
   Ill. Central Ry. Co. v. Skaggs, (Advance Opinions U. S., Oct. Term, 1915, page 251).

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY *v.* BROWN.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 399. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that a verdict in an action under the Federal Employers' Liability Act which is not unanimous, but which is legal under the law of the State, is not violative of the Seventh Amendment, and that such Amendment has no application to proceedings in state courts.

The fact that after the close of the testimony a plaintiff suing under both the Employers' Liability Act and the Safety Appliance Act withdrew his claim under the latter act, *held* in this case not to amount to a withdrawal of the testimony in regard to defective condition of the appliances and entitle defendant to direction of verdict on the ground of assumption of risk as the testimony was admissible under the issues based on the former act.

The fact that the state appellate court may have inaccurately expressed in one respect its reasons for affirmance, does not require this court to reverse, if, in fact, no reversible error exists.

The trial court having instructed the jury that if they found the plaintiff guilty of contributory negligence they should reduce his damages

in proportion to the amount of negligence attributable to him, failure to define the word proportion *held* in this case, not error.

THE facts, which involve the validity of a verdict and judgment for damages under the Employers' Liability Act, are stated in the opinion.

Mr. C. B. Stuart, Mr. W. I. Cruce, Mr. L. S. Dolman, Mr. A. C. Cruce and *Mr. M. K. Cruce* were on the brief, for the defendant in error.[1]

Mr. W. F. Evans, Mr. R. A. Kleinschmidt and *Mr. J. H. Grant* were on the brief, for the plaintiff in error.[1]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Basing his cause of action upon the Federal Employers' Liability and Safety Appliance Acts, Brown, the defendant in error, sued to recover damages resulting from injuries alleged to have been occasioned by the negligence of the Railroad Company while he was in its employ and engaged in interstate commerce. At the close of the testimony the claim under the Safety Appliance Act was withdrawn and the case was submitted to the jury alone upon the Employers' Liability Act. There was a verdict and judgment for the plaintiff which was affirmed by the court below.

There was a sharp conflict between the testimony offered on behalf of the plaintiff and that on behalf of the defendant. The material facts disclosed by the plaintiff's testimony are as follows: Brown, a head brakeman and other members of a local freight train crew on the day in question were engaged in the yards at Ashdown, Arkansas, in making up an extra freight train to be taken out by an extra crew to Hugo, Oklahoma. The cars intended

[1] See note on p. 212, *ante*.

for the interstate train were placed on an east and west passing track east of a switch connecting a spur track which ran in a northeasterly direction past a stave mill. After placing some cars from the spur track on the passing track the engine returned to the spur track with several cars, some of which were to be left at the mill and the remainder brought out and coupled to those already collected for the train and standing on the passing track. Brown accompanied the cars and after cutting off those intended for the mill gave the engineer a signal to go ahead, the engine being headed west, and when the cars approaching the switch came opposite the car on the passing track to which the coupling was to be made, Brown crossed over from the spur track to the passing track to adjust the coupler on the car standing there. Finding the knuckle of the coupler closed, he attempted to open it with the lever at the side of the car, but it did not work. He then tried to manipulate the knuckle with his hand, but could get it only part way open and closing it, he stepped out to the north side of the track (the engineer's side). As the last car coupled with the engine was then just clearing the switch, he gave the engineer a stop signal and walked west to the switch stand to set the switch so that the engine and cars might be backed to make the coupling. By the time he had walked the short intervening distance and set the switch the engine had come to a stop with the rear car a few steps west of the switch. Intending then to adjust the coupler on the end of this car, Brown gave the engineer, who was watching him, a "spot" signal which indicated that he was not to move the engine until a further signal was given by Brown, and crossed over to the south side of the track in order to use the lifting pin to open the knuckle of the coupler. When the lever failed to work he stepped behind the car and was about to try to open the knuckle with his hand when he heard the cars ahead of him move. He at once turned to leave the

track, but was struck and knocked down by the car which was backed in disregard of the "spot" signal and his feet were caught under the wheels and crushed.

The assignments of error are numerous, but those requiring to be specially noticed may be disposed of under three headings:

1. The contention that rights of the Railroad Company guaranteed by the Seventh Amendment were violated because only nine of the twelve jurors concurred in the verdict is without merit. *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211.

2. A twofold contention is based upon rulings concerning the doctrine of the assumption of the risk. Upon the withdrawal by the plaintiff of his claim under the Safety Appliance Act the court charged the jury concerning assumption of the risk as follows:

"You are instructed that by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant, but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

(a) It is insisted that the abandonment of the claim as to a violation of the Safety Appliance Act necessarily withdrew all evidence tending to show that the couplers were defective and in the absence of such evidence the proof established as a matter of law that the plaintiff assumed the risk and the court should have directed a verdict in favor of the railroad. We think the proposition is plainly without merit. The testimony concerning

the condition of the couplers was clearly admissible under the issues based on the Employers' Liability Act as explaining the occasion for Brown's being on the track and as negativing negligence on his part. In so far as the contention implies that the withdrawal of the claim was a concession that the testimony relating to the couplers was false, we think the conclusion is wholly unwarranted. If we were to conjecture as to the reason for the abandonment of the claim under the Safety Appliance Act, we think it at least quite as probable that plaintiff's counsel were of opinion that in the situation disclosed by the plaintiff's testimony the Safety Appliance Act was inapplicable.

(b) In the court below it would seem that the correctness of the general instruction as to assumption of the risk which we have quoted as given by the trial court was challenged on a ground which has been abandoned because not here pressed. But it is said reversible error exists because the court below in passing upon such objection remarked that as the "defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress," assumption of the risk was not a defense. This it is said was erroneous, first, because so far as the Safety Appliance Act was concerned, it was inapposite, as reliance upon that law by the plaintiff had been disclaimed, and second, because, under the facts it was open to find the existence of assumption of the risk depending upon conditions of fact not involved in the Safety Appliance Act. But we fail to see the pertinency of this objection, as there is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict. At best therefore the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of

reversing the judgment although no reversible error exists.

3. It is contended that the court erred in charging the jury that in the event they found the plaintiff guilty of contributory negligence they should "reduce his damages in proportion to the amount of negligence which is attributable to him," since the court did not define the word proportion and hence failed to fix any standard by which the damages should be measured. The charge is clearly distinguishable from the instruction disapproved in *Seaboard Air Line* v. *Tilghman*, 237 U. S. 499, which is relied upon, since in that case the jury were in effect instructed to diminish the damages according to their conception of what was reasonable. The instruction given is almost in the identical language of the statute and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it. There was no error therefore, leaving aside the question whether the requested instruction did not contain matters which if given would have been erroneous.

Although we have examined the whole record and as the result of that examination conclude there is no ground for reversal, we have not particularly noticed subjects embraced by some of the assignments but not pressed in argument and others not embraced by the assignments but indirectly referred to in the argument.

Affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* CARNAHAN.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 743. Argued April 19, 20, 1916.—Decided May 22, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that the contention that in trial of cases under the Employers' Liability Act the parties are entitled under the Seventh Amendment to a common-law jury of twelve men is untenable.

When the evidence shows that there will be future effects from an injury, an instruction which justifies their inclusion in the award for damages is not error.

Where the court explicitly enjoins the jury that there must be a proximate and causal relation between the damages and the negligence of the defendant and refers to the amount stated in the declaration as a limitation on the amount that can be awarded, and there is no misunderstanding as to the purpose of such reference, there is no error.

THE facts, which involve the validity of a verdict and judgment for personal injuries under the Employers' Liability Act, are stated in the opinion.

Mr. David H. Leake, with whom *Mr. Walter Leake* was on the brief, for the plaintiff in error.[1]

Mr. C. W. Allen and *Mr. H. W. Walsh* filed a brief for defendant in error.[1]

MR. JUSTICE MCKENNA delivered the opinion of the court.

Error to review a judgment in favor of defendant in error for $25,000 damages for injuries sustained through the asserted negligence of plaintiff in error.

The action was at law under the Employers' Liability Act of Congress. April 22, 1908, c. 149, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291. In accordance with the state law it was tried to a jury of seven. This is assigned as error. The only other assignment is upon an instruction of the court as to the elements of damage. There is no dispute as to the fact of injury or that it was received in interstate commerce and by the negligence of plaintiff in error.

(1) The first assignment of error is based upon a challenge by the railway company to the array of jurors on the ground that the jury was not summoned, selected, formed and constituted as provided by the Constitution of the United States. In other words, the contention is "that in the trial of cases under the Employers' Liability Act of Congress the parties are entitled to a common-law jury of twelve men, as provided for by the Seventh Amendment to the Constitution of the United States."

The assignment is without foundation. *Minn. & St. Louis R. R.* v. *Bombolis*, decided this day *ante*, p. 211.

[1] See note on p. 212, *ante*.

(2) The instruction which is the basis of the second assignment of error is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000.00, as to them may seem just and fair."

It is objected (a) that the instruction permitted a recovery in damages not only for those which proximately resulted from the injury but also for "its effects upon the future," which involved a consideration of consequences which might be essentially speculative and remote. (b) The instruction directed the jury that the damages might be in such sum not in excess of $35,000 as to them might seem just and fair. By the instruction the court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove.

The injury received is pertinent to the consideration of the instruction. In the collision of two trains defendant in error, who was a fireman, "was caught" (we quote from the opinion of the Supreme Court) "from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is for these injuries and his consequent sufferings that he sues to recover damages."

The Supreme Court expressed the view that the speculation of future results which the railway company professed to apprehend was not left by the instruction for the jury to indulge, nor did the instruction commit the amount of damages to the conjecture of the jury independently of the evidence in the case. The contention made here was explicitly rejected, viz., that the instruction permitted the jury to take into consideration the "'possible future physical effects from the injury, such as future suffering in the absence of evidence as to the probability of such.'" The court remarked that it would be a strained construction of the language of the instruction "to hold that it referred to future suffering and that damages not the proximate result of the injuries received were included under" it, and that, besides, such conclusion was precluded by an instruction given at the request of the railway company, which was "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant."

The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury an instruction which justifies an inclusion of them in an award of damages is not error. *Washington & Georgetown R. R.* v. *Harmon*, 147 U. S. 571; *McDermott* v. *Severe*, 202 U. S. 600.

It is also objected that the instruction "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000 and allowed the jury to give such sum as damages as to them might 'seem just and fair' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of."

The objection is untenable. As we have seen the court

explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the negligence of the company and the reference to the sum of $35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction. *Norfolk & West. R. R.* v. *Earnest,* 229 U. S. 114, 119.

Judgment affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* STEWART, ADMINISTRATRIX OF STEWART.

STEWART, AS ADMINISTRATRIX OF STEWART, *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Nos. 485, 904. Argued April 19, 20, 1916.—Decided May 22, 1916.

A verdict and judgment thereon in a state court in a suit by an administrator under the Employers' Liability Act, based on an instruction that the jury should find, if anything, such a sum as will fairly compensate the intestate's estate for his death, and which has been set aside for error of such instruction by the state appellate court, cannot be reinstated by this court on a writ of error to the appellate court of the State after judgment for a lesser amount on the second trial has been affirmed by that court.

Quære, whether such a verdict and judgment could be reinstated had there been no error in law in the instructions given at the first trial.

Minn. & St. Louis R. R. v. *Bombolis*, *ante*, p. 211, followed to effect that the verdict of a jury, legal under the state law but which would not be legal in a Federal court, is not a denial of Federal right under the Seventh Amendment in a suit brought in a state court under the Employers' Liability Act.

The due process provision of the Fourteenth Amendment does not require a State to provide for suspension of judgment pending appeal nor prevent its making it costly in case the judgment is upheld; nor is due process denied by adding ten per cent., as is done under the statute of Kentucky, on the amount of judgment if the same is affirmed.

The opinion of both courts below being against defendant's contention that this case should have been withdrawn from the jury, this court not disagreeing with them, affirms the judgment.

163 Kentucky, 823, affirmed.

THE facts, which involve the validity of a verdict and judgment in an action in the state court under the Employers' Liability Act, are stated in the opinion.

Mr. Benjamin D. Warfield, with whom *Mr. James C. Sims* and *Mr. John B. Rodes* were on the brief, for Louisville and Nashville Railroad.

Mr. George H. Lamar, with whom *Mr. B. F. Procter, Mr. C. U. McEllory* and *Mr. D. W. Wright* were on the brief, for Stewart.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against the Railroad Company for negligently causing the death of the plaintiff's intestate, her husband. There were two trials. A verdict and judgment for the plaintiff at the first were set aside by the Court of Appeals. 156 Kentucky, 550; 157 Kentucky, 642. A judgment for a less amount at the second trial was sustained. 163 Kentucky, 823. The Railroad Company seeks to overthrow the last judgment; the plaintiff by her cross writ seeks to reinstate the first, but failing that contends that the last should be affirmed, denying, that is, that there are any grounds for the Railroad Company's writ.

The object of the plaintiff's writ of error was to go behind the second trial and reinstate the first judgment. But the verdict was found upon an instruction that the jury should find, if anything, 'such a sum as will fairly compensate his estate for his death,' given it would seem in forgetfulness that the case arose under the act of Congress. See 157 Kentucky, 642. This instruction was excepted to and neither justice nor law would permit the verdict and judgment based upon it to be reinstated after the state court had set it aside. We therefore examine the arguments in 904 no farther and do not consider whether if in our opinion there had been no error of Federal law at the first trial the plaintiff could have had the relief that she asks. *Fairfax* v. *Hunter,* 7 Cranch,

603, 628. *Jones National Bank* v. *Yates*, 240 U. S. 541, 563.

The Railroad Company had for its principal object in bringing the case here to set up the Seventh Amendment, and to deny jurisdiction in any state court where a verdict of nine or more out of the twelve men on the jury was allowed by the local law. The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least as between the United States and a State, unless by procedure identical with that of the first is disposed of in *Minneapolis &c. R. R.* v. *Bombolis*, *ante*, p. 211.

The first of the other objections is that the Court of Appeals was not authorized to add ten per cent. damages on the amount of the judgment, as it did. But the Railroad Company obtained a supersedeas, and the law of the State makes ten per cent. the cost of it to all persons if the judgment is affirmed. There was no obligation upon the State to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So the State may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as but for such proceedings interest would run as of course until the judgment was paid.

The Railroad Company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion of both courts below and the jury were against it and as we agree with their judgment we shall not discuss this assignment of error at length. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464, 466. The facts were these: Stewart, the deceased, was engineer on a north-bound freight train upon a single track, that had to go upon a siding to make way for a south-bound freight train. There were cars already on the siding which Stewart's train pushed ahead, and this

train and the cars more than filled the siding. Therefore they pushed forward onto the main track to the rear of the south-bound train and the latter went on its way. It still, however, was necessary to keep the main track clear for another south-bound train, and therefore Stewart's train began to back so as to free the main track north of the switch which would be the first point reached by the expected train. While it was backing and approaching the southerly end of the switch the rear brakeman suddenly applied the airbrakes and the sudden shock caused the engineer to strike his head against the cab, by reason of which he died. The conductor in charge of the movement testified that he intended not to cross the southerly point of the switch and it could be found that the brakeman's act was a breach of duty, that it manifestly would cause a sudden shock, and that although the particular position of, or specific damage to Stewart was unknown to the brakeman, generically it was the kind of thing that was likely to happen, and that he and his employers were liable for consequences of that sort. The jury was instructed that Stewart assumed the risks incident to his employment and that if the application of the airbrakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, they should find for the defendant unless they found that the emergency was brought about by the defendant's servants in the negligent operation of the train before the brakes were applied. As an abstract proposition the qualification was correct, and the jury might have found that the conductor did not manage the train with due care and so made the application necessary. Whatever might have been our opinion had we been in the jury's place we do not feel warranted in saying that they had no evidence to go upon or that the instructions were wrong.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* GAINEY, ADMINISTRATOR OF DWYER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 453. Submitted April 19, 20, 1916.—Decided June 5, 1916.

Minneapolis & St. Louis R. R. v. *Bombolis, ante*, p. 211, followed to the effect that the Seventh Amendment does not apply to actions brought in the state courts under the Federal Employers' Liability Act.

Chespeake & Ohio Ry. v. *Kelly, ante*, p. 485, followed to the effect that in estimating the amount of damages recoverable under the Employers' Liability Act, the interest bearing capacity of a present award must be considered; and the whole loss sustained by the beneficiaries during the period that the benefits cover cannot be included in the verdict without rebate or discount.

162 Kentucky, 427, reversed.

THE facts, which involve the application of the Seventh Amendment to cases in the state court under the Employers' Liability Act, the construction of that act, and the validity of a judgment thereunder, are stated in the opinion.

Mr. E. L. Worthington, Mr. W. D. Cochran, Mr. Le-Wright Browning and *Mr. P. K. Malin* for plaintiff in error.[1]

Mr. R. S. Dinkle and *Mr. Watt M. Prichard* for defendant in error:

Complaint that certain phraseology used in the measure of damage instruction was misleading is without merit, because it is evident that plaintiff in error was not prejudiced thereby.

Present cash value theory is not correct in principle and has never been sanctioned by the Supreme Court of the United States or lower Federal courts. *C. & O. Ry. Co.* v. *Kelly's Admr.*, 160 Kentucky, 296.

There was no substantial error in the measure of damage instruction, as a consideration of it as a whole shows clearly that the jury were limited to finding the "pecuniary loss" to the dependent beneficiary.

If errors were in the measure of damage instruction, same were invited by plaintiff in error and were not properly preserved as ground of error either under the state practice or the practice of this court. *L. & N. Ry. Co.* v. *Woodford*, 153 S. W. Rep. 722; 156 Kentucky, 398; *Patterson* v. *Moss*, 97 S. W. Rep. 397; 30 Ky. L. R. 10; *L. & N. Ry. Co.* v. *Wilkin's Guardian*, 136 S. W. Rep. 1024; *L. & N. Ry. Co.* v. *Simrall's Admr.*, 127 Kentucky, 55; 104 S. W. Rep. 1011; *Loughridge* v. *Baugh*, 118 S. W. Rep. 321; *Burdette* v. *Mullin's Exr.*, 110 S. W. Rep. 855; *Ill. Central Ry.* v. *Skaggs*, 240 U. S. 66.

Mr. Justice Pitney delivered the opinion of the court.

This was an action under the Employers' Liability Act of Congress of April 22, 1908, as amended April 5,

[1] See note on p. 212, *ante*.

1910 (c. 149, 35 Stat. 65; c. 143, 36 Stat. 291). It was brought to recover damages for the death of Richard Dwyer, caused by the negligence of the railroad company, while he was in its employ in interstate commerce. The sole beneficiary was decedent's widow, who originally qualified as administratrix and brought the action, but has died since the allowance of the present writ of error.

Laying aside a contention based upon the Seventh Amendment to the Federal Constitution, which has been disposed of in *Minneapolis & St. Louis R. R.* v. *Bombolis*, *ante*, p. 211, the only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict for $16,000. On appeal to the Kentucky Court of Appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of $16,000 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention, on the authority of *Ches. & Ohio Ry.* v. *Kelly's Admx.*, 160 Kentucky, 296, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the Court of Appeals in the present case (162 Kentucky, 427) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict. Since we have held, in *Ches. & Ohio Ry.* v. *Kelly, Admx.*, this day decided, *ante*, p. 485, that the theory is erroneous, it results that the judgment here under review must be

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.